Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

RUTH HOPKINS AND JOHN KAYWOOD HOPKINS,
husband and wife,
and the marital community composed thereof,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation;
KAISER ALUMINUM AND
CHEMICAL CORPORATION,
a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Judgment was entered in Petitioners' favor on July 13, 1994. Respondents filed motions under Fed.R.Civ.P. 50 (b) and 59, but did not effect timely service. Nonetheless, the trial court granted judgment as a matter of law (JMOL) in favor of Respondents and ordered a new trial under Fed.R.Civ.P. 50(b) (Rule 50(b)). On December 1, 1995, Rule 50(b) was amended to provide that post-trial motions only needed to be filed, not served, within ten days of a judgment. On appeal, the Ninth Circuit retroactively applied amended Rule 50(b) and held, despite untimely service of the Rule 50(b) motion, the trial court had jurisdiction to grant JMOL and order a new trial and dismissed petitioners' appeal. Under this scenario, the questions presented are:

1. May amended Fed.R.Civ.P. 50(b), effective December 1, 1995, be applied retroactively to a case in which judgment was entered on July 13, 1994, when to do so would attach new legal consequences to actions already completed, deny Petitioners their substantive and vested rights to judgment that had become final by operation of law and passage of time, and retroactively vest the trial court with jurisdiction to grant JMOL and order a new trial when that jurisdiction would clearly have been lacking under pre-amendment Fed.R.Civ.P. 50(b)?

2. In a personal injury action tried under federal diversity jurisdiction, may a trial court, under Fed.R.Civ.P. 50(b), grant JMOL in favor of Respondents on an "issue" (i.e. damages for a certain type of injury) when Petitioners' "claim" (negligence) remains provable in the absence of the such "issue", when Respondent

QUESTIONS PRESENTED – Continued

failed to properly preserve issues in its Rule 50(a) motion and failed to request specific instructions on such issues?

LIST OF PARTIES

Petitioners are Ruth and John Hopkins, husband and wife, (hereinafter Hopkins) (Plaintiffs in the District Court and Appellees in the Court of Appeals). Additional Plaintiffs below filing separate petitions are Deborah Williams, David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Kathrene Froese and Merlin Carlson, Jr.

Respondents in this court (Defendants in the District Court and both Appellee and Appellants in the Court of Appeals) are General Electric Company and Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation (hereinafter collectively referred to as "G.E.").

LIST PURSUANT TO RULE 29.6

According to its prior corporate disclosure statements, the General Electric Company is a publicly held corporation with no parent companies. Its subsidiaries and affiliates are General Electric Capital Corporation; General Electric Credit International, N.V.; Montgomery Ward and Company, Inc.; General Electric Preferred Asset Corporation; CAMCO, Inc. (Canada); General Electric Capital Services, Inc.; GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; GNA Corporation; Mercur Bank (Austria); Imaging Financing Services, Inc.; and Dart V. Kraft, Leasing Corporation.

LIST PURSUANT TO RULE 29.6 – Continued

Kaiser Aluminum and Chemical Corporation, a wholly owned subsidiary of Kaiser Aluminum Corporation, has equities securities which are publicly held. Kaiser Aluminum Corporation's parent, Maxxam, Inc., has debt and equity securities which are publicly held, and affiliates with either publicly held equity or debt securities Maxxam Group, Inc.; the Pacific Lumber Company; Scotia Pacific Holding Company; and Sam Huston Race Park, Ltd.

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PETITION FOR WRIT OF CERTIORARI

John and Ruth Hopkins, husband and wife, plaintiffs below and Petitioners herein (hereinafter Hopkins), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, Ninth Circuit, entered on July 23, 1997, and affirmed by order filed November 24, 1997, denying Hopkins' petition for rehearing and suggestion for rehearing en banc. Petitioners submit that the Ninth Circuit's rulings below are appropriate for this Court's consideration for the reasons that the Ninth Circuit's decision has decided on important federal question that has not, but should be, decided by this Court, namely the retroactivity of an amended Federal Rule of Civil Procedure (Rule 50(b)). In so deciding, the Ninth Circuit's decision is in conflict with prior decisions of this Court, prior decisions of the Seventh Circuit, as well as prior decisions within its own circuit. The Ninth Circuit's decision also represents a departure from the usual and accepted course of judicial proceedings, or sanctions the trial court's departure from usual and accepted proceedings in such a manner as to warrant the exercise of this court's supervisory power.

OPINIONS BELOW

The judgments rendered at the trial court level and rulings by the trial court which give rise to the appeal to the Ninth Circuit are set forth at App. D (judgment of July 13, 1994); App. C (as applied to Petitioners Hopkins, pertinent portions of trial court ruling of November 25,

1994; App. F (trial court order of January 17, 1995) and App. E (Amended Judgment of November 25, 1994). The opinion of the United States Court of Appeals, Ninth Circuit, that gives rise to this petition is *Schudel et al. v. General Electric Co.*, 120 F.3d 99 (9th Cir. 1997). App. A. By order filed November 24, 1997, the Ninth Circuit denied Hopkins' petition for rehearing and suggestion for rehearing en banc. App. B.

JURISDICTION

This action was commenced on September 30, 1991 in the Spokane County, Washington Superior Court and thereafter removed by Defendants General Electric and Kaiser Aluminum (hereinafter collectively referred to as G.E.) to the Federal District Court, Eastern District of Washington based upon diversity of citizenship under 28 U.S.C. Sec. 1332(a)(i). Following a 54 day jury trial, judgment was entered on July 13, 1994 in favor of Hopkins and others. App. D. G.E. filed its motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) (hereinafter Rule 50) and alternative motion for a new trial under Fed.R.Civ.P. 59 (hereinafter Rule 59) on July 27, 1994.[1]

[1] The record does not reflect that Hopkins and others were ever served with the post-trial motions as required by the rules. At trial and on appeal, Hopkins claimed ineffective service of these motions deprived the trial court of jurisdiction to rule on G.E.'s post trial motions. The Ninth Circuit concluded that the attempt to serve Hopkins by delivering the motions to a private delivery service was ineffective and therefore untimely, citing to *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996).

G.E. did not file a notice of appeal challenging the July 13, 1994 judgment.

On November 25, 1994, the trial court, without oral argument, granted judgment as a matter of law (hereinafter JMOL) in favor of G.E. and ordered a new trial under Rule 50(b) despite arguments by Hopkins and others that it lacked jurisdiction to rule on said motions. The trial court denied G.E.'s Rule 59 motions in their entirety. App. E and F.

Hopkins appealed to the Ninth Circuit Court of Appeals under 28 U.S.C. Sec. 1291. The Ninth Circuit issued its opinion on July 23, 1997. *Schudel et al. v. General Electric Co.*, 120 F.3d 991 (9th Cir. 1997). App. A (hereinafter *Shudel*). Thereafter, on November 24, 1997, the Ninth Circuit denied Hopkins timely filed motion for rehearing and suggestion for rehearing en banc. App. B.

Pursuant to Supreme Court Rule 13.1 and 13.3, this petition for certiorari has been filed within 90 days of the denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

Due to the lengthy nature of the material, the full text of the following Constitutional provisions, statutes and court rules are set forth in App. G:

The Fifth Amendment to the United States Constitution

The Seventh Amendment to the United States Constitution

28 U.S.C. Sec. 2072

Fed.R.Civ.P. 50(a) (1994 version.)

Fed.R.Civ.P. 50(b) (1993 and 1995 amended versions.)

Fed.R.Civ.P. 59 (1966 and 1995 amended versions.)

Supreme Court Order dated April 27, 1995 adopting amended Fed.R.Civ.P. 50 and 59.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs John and Ruth Hopkins, husband and wife, employees of Qualified Personnel, Inc. (QPI), worked at the Kaiser Aluminum plant in Spokane, Washington in the fall of 1988. Kaiser Aluminum contracted with G.E. to clean up a PCB-contaminated room at its Spokane plant and G.E. in turn contracted with QPI to provide personnel, including the Hopkins, to work at the clean-up. Several toxic chemicals and detergents were used in the clean-up. In brief, the harmful effects of these agents were well known to G.E. and the proof at trial established that G.E. failed to take appropriate steps to protect the Hopkins from harmful levels of exposure to these agents. The Hopkins suffered severe and permanent injuries as a result and thereafter commenced a cause of action based in negligence and loss of consortium for injuries each received as well as for injury to their respective spouse.

Each Hopkins was exposed to chemicals and detergents in sufficient amounts to have produced a permanent respiratory ailment diagnosed as Reactive Airways Dysfunction Syndrome or Reactive Airways Disease Syndrome (RADS).[2] Mrs. Hopkins became so ill she was hospitalized for three days. Secondary to RADS, Mrs. Hopkins suffered from a severe, permanent depression, which required medication and extensive psychotherapy. Mrs. Hopkins, due to her depression and RADS, was unemployable. The evidence further showed Mrs. Hopkins had memory and concentration problems as a result of her depression. Both Hopkins will be predisposed to future respiratory infections as a result of RADS and Mr. Hopkins must work in an irritant free environment, thus limiting future employment prospects.

Unchallenged trial testimony showed that the Hopkins' lifestyles were severely impaired and their injuries restricted their ability to enjoy the lifestyle they once enjoyed as individuals and as a married couple.

G.E. contended that the exposure, if any, was insufficient to have caused injury, and that the Hopkins' smoking history caused their respiratory ailments.

After 54 days in trial, the case went to the jury on special verdict forms as to each Plaintiff.[3] Neither party

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[2] RADS is a condition wherein exposure to non-specific odors subjects a person to sever asthma-like attacks. RADS requires daily medication. An attack is severely debilitating and its effects can last for weeks.

[3] Mrs. Hopkins claimed damages due to respiratory injuries and depression and Mr. Hopkins claimed respiratory

sought to have the jury instructed to award damages on the basis of each individual injury. The jury returned a verdict in favor of John Hopkins of $1,348,020.00 for compensatory damages, and $602,250.00 for his loss of consortium and a verdict for Ruth Hopkins of $1,404,040.00 as compensatory damages and $602,250.00 for her loss of consortium. Judgment from the verdict was entered on July 13, 1994. App. D.

G.E. filed its Fed.R.Civ.P. 50(b) and alternative motion for a new trial under Fed.R.Civ.P. 59 on July 27, 1994.[4] On November 25, 1994, the trial court, without oral argument, denied Hopkins' and others motions regarding untimely service and granted judgment in favor of G.E.[5] The trial court denied G.E.'s motion for a new trial under Fed.R.Civ.P. 59 in its entirety and certified this case for appeal pursuant to Fed.R.Civ.P. 54(b).

Hopkins appealed to the Ninth Circuit, alleging the trial court lacked jurisdiction to grant judgment as a

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injuries. Each claimed, and the jury was specially instructed on the issue of loss of consortium as to each spouse. Each testified as to the tremendous loss of companionship and intimacy they suffered as a result of the respiratory injury to the other.

[4] July 27, 1994 was the 10th judicial day following entry of the judgment and thus the last day to file and effect service under then existing Fed.R.Civ.P. 50(b) and 59. See Fed.R.Civ.P. 6.

[5] While acknowledging the evidence sustained respiratory injury caused by G.E.'s negligence, and resulting loss of consortium, the trial court ruled that both Hopkins made a "claim" for brain damage which was not proven. Hopkins disputes this finding. Thus, the trial court felt the unproven "claim" for brain damage "tainted" the jury verdict and ordered a new trial. See App. C.

matter of law (hereinafter JMOL) and a new trial under Rule 50(b).

The Ninth Circuit dismissed the Hopkins appeal, reasoning that it lacked jurisdiction to consider an appeal as the negligence claims were not "final" and the new trial order was interlocutory in nature. App. A. The Ninth Circuit, by order dated November 24, 1997, denied Hopkins' timely filed petition for rehearing. App. B.

For reasons that follow hereafter, the Ninth Circuit's decision dismissing the appeal, affirming the trial court's grant of JMOL and order for a new trial should be reversed and plaintiff Hopkins' verdicts reinstated, together with interest from July 13, 1994 until paid.[6]

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[6] Hopkins adopts, to the extent applicable, each and every argument of Plaintiffs/Petitioners listed in the Parties section, *supra*, insofar as the questions or issues presented, arguments made, or authorities being advanced by said parties in their Petitions for Certiorari being separately filed herein, may relate to issues in common. See Rules of U.S. Supreme Court, Rule 12(4).

ARGUMENT FOR GRANTING THE WRIT

I.

The Ninth Circuit's retroactive application of Fed.R.Civ.P. 50(b) as amended, effective December 1, 1995, under the facts of this case, is in conflict with decisions of this court, notably *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 128 L.Ed.2d 29, 114 S.Ct. 1488 (1994) and *Hughes Aircraft v. United States, ex rel. William J. Schumer*, 520 U.S. ___, 138 L.Ed.2d 135, 117 S.Ct. 1871 (1997), is in conflict with another decision of the Ninth Circuit, *Chenault v. United States Postal Service*, 37 F.3d 535 (9th Cir. 1994) and a decision of the Seventh Circuit, *Pro Football Weekly, Inc. v. Gannett Co., Inc.*, 988 F.2d 723 (7th Cir. 1993).

The above cases hold that absent an express declaration to the contrary, amended statutes may not be applied retroactively in such a manner as to change the legal effect of conduct at the time it took place, especially when to do so is prejudicial to one of the parties or operates to deprive a party of a vested right. To prevent an unjust result in this case and to further assist courts in the future on issue of retroactivity of amended civil rules, as well as bring uniformity among circuits and this Court's decisions on the subject, this court should grant this petition.

Furthermore, the Ninth Circuit's decision in this case has decided an important question of federal law that has not been, but should be, decided by this Court, namely the retroactivity of an amended Federal Rule of Civil Procedure to a case that has been completed and in which judgment, under previous civil rules and case law became final.

The Ninth Circuit correctly ruled that G.E.'s post-trial motions were served in an untimely manner. 120 F.3d at 944. While this case was on appeal by Hopkins and others to the Ninth Circuit, challenging the trial court's authority to rule on untimely post-trial motions, Rule 50(b) and Rule 59 were amended, effective December 1, 1995, to provide that post-trial motions are timely if filed within 10 days of judgment.[7] Under the version of Rule 50(b) in effect at the time that this case was concluded and judgment entered, it was settled law that failure to *serve* and *file* post-trial motions on or before the 10th day following judgment deprived the trial court of jurisdiction rule on the motions. *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 217, 91 L.Ed. 849, 67 S.Ct. 752 (1946).[8]

Despite finding service of G.E.'s post-trial motions untimely under the pre-1995 version of Rule 50(b), and in apparent disregard for the above authority, the Ninth Circuit retroactively applied the amended 1995 version of Rule 50(b) to this case, noting at 120 F.3d 994:

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[7] The full text of Fed.R.Civ.P. Rule 50(b) and 59, prior to and after the 1995 amendments, is set forth in App. G.

[8] See also *Johnson v. New York, New Haven and Hartford R.R. Co.*, 344 U.S. 48, 97 L.Ed. 77, 73 S.Ct. 125 (1952) (Requirement of a timely application for judgment under Rule 50 is firmly grounded in principles of fairness); *Browder v. Department of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556, 561, 54 L.Ed.2d 521 (1978); *Thompson v. Immigration and Naturalization Service*, (Clark, J. Dissenting), 375 U.S. 384, 11 L.Ed.2d 404, 407, 84 S.Ct. 397 (1964) (Post trial motions not *timely served* do not toll appellate deadlines.)

> This proceeding was pending on December 1, 1995, and no prejudice will result from application of the amendments. . . . We have applied amended federal rules of appellate procedure retroactively in similar circumstances, See *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir. 1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994); and do so here.[9]

This holding conflicts with the notion deeply rooted in American jurisprudence that absent an express declaration that a statute or rule is to be applied retroactively, there is a strong presumption *against* its retroactive application. *Hughes Aircraft, supra* at 138 L.Ed.2d 146. In amended Rule 50(b), there is no clear expression of retroactivity. Rather, its provisions apply to cases filed after December 1, 1995 and to "pending" cases only "insofar as just and practicable." S.Ct. Order, Amendments to the Fed.R.Civ.P. (Apr. 27, 1995).

> As noted in *Landgraf*, (Scalia, J. concurring) at 269:
>
> . . . a *procedural* change should no more be presumed to be retroactive than a *substantive* one . . . Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. (emphasis original)

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[9] The flawed logic in this analysis is that *but for* the trial court *exceeding* its jurisdiction by ruling, contrary to existing case law, that it *had* jurisdiction to rule on the post-trial motions, this case would have not been "pending" on December 1, 1995, as there would be nothing to appeal. G.E. never filed a notice of appeal under Fed.R.App.P. 4 and Hopkins would not contest the verdict in their favor.

The *Schudel* court erred, much like the Ninth Circuit did in the *Hughes Aircraft, supra* case. This Court, in reversing the Ninth Circuit in the *Hughes* case, held that defining a statute as "jurisdictional" and thus "an exception to the general *Landgraf* presumption against retroactivity" is erroneous "for the only "presumption" mentioned in that opinion is a general presumption *against* retroactivity." *Hughes Aircraft, supra* at 138 L.Ed.2d 146.[10]

In this case, the Ninth Circuit's classification of the amendments to Rule 50(b) as merely jurisdictional or procedural disregards the holding of *Landgraf, supra. Landgraf* at 128 L.Ed.2d at 258-59 n.29, held that classifying a statute as "procedural" and thus automatically retroactive, is error, noting:

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. . . . Our orders approving amendments to federal procedure rules reflect the common-sense notion that the *applicability of such provisions ordinarily depends on the posture of a particular case* . . . we do not restrict the presumption against retroactivity to those cases involving "vested rights" . . . Nor do we suggest that concerns about retroactivity have no application to procedural rules. (emphasis added)

In this case, amended Rule 50(b) operates much like the statute in question in *Hughes*. In both cases, the

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[10] Rule 50(b), while designated a procedural rule, takes on the aspects of a "jurisdictional" rule affecting vested and substantive rights of the parties, particularly when the trial court lacks jurisdiction based on an untimely post-trial motion.

amendments not only allocate "jurisdiction" among courts, but *"create"* jurisdiction where none previously existed. If a rule or statute, as amended, creates:

> . . . jurisdiction where none previously existed, it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to a presumption against retroactivity as any other.
>
> *Hughes Aircraft, supra* at 146.

A statute has retroactive effect if, when applied, "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf, supra* at 255. In this case, application of the "new provision" (filing only vs. filing and service) attaches new legal consequences of a severely prejudicial nature. Under pre-amended Rule 50(b), the trial court lost jurisdiction to rule as the motions were not timely filed and served. Retroactive application of the "new provision" (1995 version of Rule 50(b)) gave to the trial court jurisdiction to grant G.E.'s motions where none existed pre-amendment. The end result is that the Hopkins lost their judgments which had become final by passage of time. Thus, the "new legal consequences" are most severe.

The Ninth Circuit's opinion in this case is also seemingly at odds with its own decision in *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994), wherein the *Chenault* court noted:

> Regardless of whether a statute is "substantive" or "procedural", it may not apply to cases pending at the time of enactment if the new statute

> would prejudice the rights of one of the parties. . . .

By applying the 1995 version of Rule 50(b) to this case, the *Schudel* court gave the trial court jurisdiction it had lost, thus allowing its JMOL and new trial order to stand. As a result, the Hopkins and others must bear the expense, uncertainty, and time involved in appeals and retrials. For this reason, and the fact that the Hopkins lost their right to judgment, Hopkins submits that the above language of *Chenault* has been violated. These factors clearly show that the Hopkins have been prejudiced by the *Schudel* court's application of amended Rule 50(b). In this respect, "[e]lementary considerations of fairness" and the "settled expectations" of the Hopkins were not just "lightly disrupted", they were completely trampled. *Landgraf* at 252.

Granting the petition in this case is also necessary due to an apparent conflict between the Ninth Circuit's opinion in this case and the Seventh Circuit's decision in *Pro Football Weekly, Inc. v. Gannett Co., Inc.*, 988 F.2d 723 (7th Cir. 1993). In the *Gannett* case, the trial court applied Rule 50(b) as it was in effect on November 18, 1991 and granted a directed verdict in favor of Gannett on certain issues tried to a jury. Thereafter, Rule 50 was amended, effective December 1, 1991. On review, the Seventh Circuit held at 725:

> Federal Rule of Civil Procedure 50 governs the process by which a directed verdict and a judgment notwithstanding the verdict (j.n.o.v.) may be obtained. This rule was amended on December 1, 1991; proceedings below were concluded prior to the rule's amendment and therefore *we*

> *are guided by the prior version of Rule 50,* (emphasis added).

A like result is compelled here. In this case, the trial court proceedings were concluded 1½ years prior to the effective date of the 1995 version of Rule 50(b). In this case, as in the *Gannett* case, the fact that the matter was on appeal at the time the amended rule was effective did not mean the case was "pending" and therefore subject to a retroactive use of the amended version of Rule 50. The *Gannett* reasoning is consistent with the general presumption against retroactivity articulated in *Landgraf* and *Hughes*, whereas the Ninth Circuit's opinion in this case conflicts with that presumption.

Intervention by this court is necessary to harmonize inconsistent decisions among circuits regarding the retroactive application of an amended rule of civil procedure. Further, Petitioner's research disclosed no case in which this court has directly decided the retroactive nature of amended rules of civil procedure. As the decision by the Ninth Circuit in this case conflicts with the decisions of this court in the area of retroactivity, especially in such a way as to depart from the usual and accepted course of judicial procedure, this court should grant the petition to clarify the applicable law in this area.

II.

The Ninth Circuit's retroactive application of amended Fed.R.Civ.P. 50(b), effective December 1, 1995, was error in that this case was not "pending" on the effective date of the amendment, nor would it be "just and practicable" to apply the amended rule to the facts of this case.

The Ninth Circuit's retroactive application of amended Fed.R.Civ.P. 50(b), effective December 1, 1995, to the facts of this case, was in error as this case was not "pending" on the effective date of the amendment, nor is such application "just and practicable" as required by this Court's order, dated April 27, 1995 at 131 L.Ed.2d xcii, adopting the amended rules. In this respect, the Ninth Circuit has addressed an important federal question, which has not, but should be addressed by this court. Specifically, this court should determine whether a case was "pending" and what circumstances fall within the "just and practicable" language above in deciding the extent that the amended Rule 50(b) may be applied retroactively. In addition, the Ninth Circuit has further departed from the usual and accepted course of judicial proceedings in such a manner as to warrant the exercise of this Court's supervisory power.

A.

This case was not "pending" on the effective date of the amended Rule 50(b), December 1, 1995.

Amended Rule 50(b) may apply to cases that are "pending" on the effective date of the amendments if to do so would be "just and practicable". S.Ct. Order, Amendments to Fed.R.Civ.P. (Apr. 27, 1995). In this case, Hopkins and others contended that untimely service of

post-trial motions under Rules 50(b) and 59 deprived the trial court of jurisdiction to address said motions. Had the trial court properly ruled on November 25, 1994, as was ultimately determined by the Ninth Circuit, that the post-trial motions were not timely served, it would have been, by law, without jurisdiction to rule on the pending motions. *Browder v. Department of Corrections, supra.*[11]

Judgment was entered in Plaintiff's favor on July 13, 1994. Timely filing and service of post-trial motions were required, under then existing versions of Rule 50(b) and Rule 59, no later than July 27, 1994. Only the timely filing and service of these motions would toll the time for G.E. to appeal from this judgment. Under Fed.R.App.P. 4(a)(1), G.E. had 30 days to file a notice of appeal from judgment, or until August 12, 1994. G.E. *never* filed a notice of appeal from this judgment at any time. As such, this judgment became irrevocably final on August 13, 1994.[12]

This case was not "pending" for purposes of application of amended Rule 50(b), as Hopkins and others were

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[11] In this respect, Hopkins' right to judgment was lost when the trial court improperly exercised jurisdiction predicated on untimely served motions. Hopkins' only redress was to file an appeal. Instead of securing relief, the Ninth Circuit ruled that in appealing, Hopkins caused the case to be "pending" on December 1, 1995. As if this were not enough, this injustice was taken full circle by the Ninth Circuit's retroactive grant of "jurisdiction" to the trial court by applying amended Rule 50(b).

[12] Fed.R.App.P. 4 was amended in 1993 to provide that premature notices of appeal would be held in abeyance pending post-trial rulings by the trial court. Even with this option, G.E. gambled that it had tolled the appeal deadlines with its post-trial motions, and elected not to appeal the July 13, 1994 judgment. As such, this judgment was final on August 13, 1994.

forced to appeal to contest the power of the District Court to enter judgment in the first instance, notwithstanding untimely served post-trial motions.[13] To hold that this case is "pending" by the existence of an appeal, under the facts of this case, negates the principle that the law in effect at the time of the conduct should govern absent clear expression to the contrary. *Landgraf, supra.*

B.

Retroactive application of Rule 50(b) as amended is neither "just" nor "practicable".

Statutes are not to be applied retroactively if such an application will prejudice one of the parties. *Chenault, supra.* In addition, if retroactive application of a law will affect the "substantive" or "vested" rights of a party, even if it is deemed procedural in nature, retroactivity is not favored. *Landgraf, supra.* By restoring jurisdiction to the trial court, while simultaneously rewarding G.E. for non-compliance with the service deadline in then Rule 50(b), the Ninth Circuit has made the prejudicial and unjust nature of the retroactivity in this case obvious. The end result is that Hopkins and others lost their vested rights to a judgment which, based on the lapse of time to file an appeal (30 days), became final. It would be difficult to

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[13] The Ninth Circuit's determination that this case was "pending" is only made possible by the fact that Hopkins and others were *forced* to appeal the trial court's lack of jurisdiction. It seems anomalous that Hopkins had to contest, by way of appeal, the trial court's lack of jurisdiction and this very fact becomes the reason the case is "pending" and subject to retroactive application of a rule, resulting in the trial court regaining jurisdiction it previously lost under the pre-1995 rule.

imagine a more unfair result, particularly when the *Schudel* court ruled the case was "pending" because Hopkins appealed the lack of the trial court's jurisdiction in the first place.

The Ninth Circuit did little or no analysis as to whether it was "just and practicable" under the "posture of the particular case", *Landgraf, supra,* to retroactively apply amended Rule 50(b) to this case.[14] Clearly, plaintiffs have been prejudiced in that their vested and substantive right to a judgment, which had theretofore become final, was lost by application of a rule enacted one and a half years after trial and applied by an appellate court three years after trial. The conduct in question, untimely service, and its effect of depriving the trial court of jurisdiction, had long since come and gone.

The Ninth Circuit's opinion, "much like extending a statute of limitations after the pre-existing period of limitations has expired, impermissibly revives a moribund cause of action (see, e.g., *Chenault v. U.S. Postal Service,* 37 F.3d 535, 537, 539 (CA 9, 1994)", *Hughes Aircraft, supra,* L.Ed.2d at 146. Such a result is hardly "just".

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[14] Retroactive application of amended Rule 50(b) would be beneficial for G.E. as it allows it to escape the harsh impact occasioned by application of strict rules setting jurisdictional timelines. But that does not necessarily make it "just". In the end, any erosion of the principle of finality harms G.E. and all other actual or potential litigants. The doctrine of finality of litigation and strict adherence to timelines of a jurisdictional nature requires a finding that this rule, as amended, not be given retroactive effect. See *Browder v. Dept. of Corrections, supra* and *Carlisle v. United States,* 517 U.S. 416, 134 L.Ed.2d 613, 116 S.Ct. 1460 (1996).

Clearly, on these facts, there was a definitive change in the "substance of the extant cause of action". *Hughes Aircraft* at 146. Just as a subsequent amendment to a statute of limitation will not revive a time-barred claim, subsequent amendment of a rule of civil procedure may not revive a time-barred post-trial motion.[15] This Court recently affirmed the *Landgraf* principles in *Hughes Aircraft, supra* at 143, noting:

> "The principle that the *legal effect of conduct* should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Hughes Aircraft* at 143 (emphasis added).

Applying this rule to the facts at hand, the "legal effect of conduct" at issue (untimely compliance with pre-1995 Rule 50(b) and Rule 59 filing and service requirements) would be, as it has been for decades, that the trial court lacked jurisdiction to rule on said motions. Likewise, G.E. would be precluded, save for a timely appeal, from challenging the judgment. To allow retroactive application of Rule 50(b) in this case becomes "unjust", as it changes the "legal effect of the conduct" after it had occurred.

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[15] See e.g., *Bulgo v. Munoz*, 853 F.2d 710, 715 (9th Cir. 1988) (declining to give retroactive effect to amendment of statutes of limitations which would have revived plaintiff's barred claim; *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 (9th Cir. 1975), *cert. den'd*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977) (general rule that subsequent extensions of statute of limitation period will not revive a claim previously barred). *Chenault v. United States Postal Service, supra* at 539 (new statute of limitation will not revive claim barred under prior law-to do so would "alter the substantive rights" of a party.)

In discussing the retroactive application of an amended rule to cure invalid service, the court in *United States v. 51 Pieces of Real Property in Roswell, NM*, 17 F.3d 1306, 1312 (10th Cir. 1994), noted:

> Moreover, even if the provisions were otherwise retroactive, we doubt that they could retroactively validate service of process that was invalid when executed.[16]

Retroactive application of the 1995 version of Rule 50(b) in this case is also impracticable. To do so would require fabrication of jurisdiction for the trial court that had long been lost under the old rule.

III.

The Ninth Circuit's retroactive application of amended Rule 50(b) in this case violates the judicial doctrine favoring finality of judgments set forth in *Browder v. Department of Corrections, supra.*

Retroactive application of Rule 50 in this case ignores the long established doctrine favoring finality of litigation. *Browder v. Director, Department of Corrections of Illinois, supra. Browder* held that time limits prescribed in the civil rules are mandatory and jurisdictional noting:

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[16] See also *Boltes v. Entex*, 158 F.R.D. 110, 112 (S.D. Tex. 1994). It is "well established" that in reviewing proper service, the court looks at the "version of the Federal Rules of Civil Procedure in effect at the time the complaint is filed." The same argument applies with equal force to this case. In both instances, the relevant conduct speaks to the power of the court to address the issues and the substantive rights of the parties to maintain or terminate an action.

> The purpose of the rule is clear: It is "to set a definite point of time when the litigation shall be at an end, unless within the time prescribed application has been made; and if it is not, to advise prospective appellees that they are freed of the appellant's demand. Any other construction of the statute would defeat its purpose.

Browder at 54 L.Ed.2d 531.

Browder further noted that only a timely filing of a post-trial motion would toll the applicable period in which to file an appeal. *Id.* at 533. Rule 50 and 59 motions are based in the interests of "speedy disposition and finality". *Browder* at 536.

This court has specifically recognized, in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 115 L.Ed.2d 481, 111 S.Ct. 2439, *reh. den.*, ___ (US) ___, 130 L.Ed.2d 1131, 115 S.Ct. 1179 (1991) that retroactive application of statutes in civil cases must be done with the principle of finality of judgments in mind:

> Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 84 L.Ed.2d 329, 60 S.Ct. 317 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.

James B. Beam Distilling v. Georgia, at 115 L.Ed.2d 492.

More recently, this court in *Carlisle v. United States,* 517 U.S. 416, 134 L.Ed.2d 613, 116 S.Ct. 1460 (1996), held as untimely, a motion for judgment of acquittal filed *one day* after the seven day period set forth in Fed.R.Crim.P.

29(a) and ruled as a result that the district court lacked jurisdiction to grant the motion.[17]

In this case, as in *Carlisle*, the plain, unambiguous directions of the rule were not complied with by the party seeking relief. In this case, as in *Carlisle*, the trial court loses jurisdiction absent a timely motion. In either event, the use of an amended rule to "vest" a court with jurisdiction outside the applicable timeliness is prohibited by the judicial doctrine favoring finality of judgments. In this case, Hopkins and others were deprived of their substantive right to a several million dollar judgment, by a trial court lacking jurisdiction based upon inappropriately and ill-preserved motions by G.E. Only the retroactive application of the 1995 version of Rule 50 by the Ninth Circuit makes this unjust result possible. This action is not only far from the usual course of judicial proceedings, but it has the effect of rewarding the dilatory conduct of the moving party, without justification, and further sanctions the failure of the trial court to exercise jurisdiction in accordance with established law.

This court should grant this petition and provide direction to the lower courts as to the proper rule to be applied when the retroactive application of a civil rule

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[17] The *Carlisle* court, at 627, citing to *United States v. Locke*, 471 U.S. 84, 101, 85 L.Ed.2d 64, 105 S.Ct. 1785 (1985), noted the problems associated with application of a rule authorizing untimely filings of post-trial motions:

> "If one day late filings are acceptable, ten day late filings might be equally acceptable, and so on and the cascade of exceptions would engulf the rule erected by the filing deadline. . . . "

implicates the finality of judgment doctrine set forth above.

IV.

Retroactive application of amended Fed.R.Civ.P. 50(b) violates Hopkins' Fifth Amendment rights to Due Process, Seventh Amendment Right to Trial by Jury, and the statutory commands of the Rules Enabling Act, 28 U.S.C. Sec. 2072.

Retroactive application of amended Rule 50(b) violates Hopkins' substantive rights to due process under the Fifth Amendment. Once the trial court lost jurisdiction to rule on post-trial motions, and the period of time to appeal lapsed, Hopkins' judgment became final. A judgment, much like a property right, may not be vacated by retroactive legislation without violating due process rights.[18]

The doctrine of "vested rights" represents due process, and is grounded upon the recognition that "rights fixed by judgment are, in essence, a form of property over which the legislatures have no greater power than any other [property]." *Georgia Association of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988) (emphasis omitted), *cert. den'd*, 490 U.S. 1090, 109 S.Ct. 24, 31, 104

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[18] As noted in *Landgraf, supra* at 253:

> The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights . . . The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation . . .

L.Ed.2d 988 (1989). In *Hodges v. Snyder*, 261 U.S. 600, 603, 43 S.Ct. 435, 436, 67 L.Ed. 819 (1923), this court noted:

> . . . the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation.

See also *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 437 (18 How.), 15 L.Ed. 435 (1852).

Further, in applying amended Fed.R.Civ.P. 50(b), the Ninth Circuit violated the statutory dictates of The Rules Enabling Act, 28 U.S.C. Sec. 2072(b), which provides that while the Supreme Court may enact rules of procedure, any such rule "shall not abridge, enlarge or modify any substantive right." Thus while amended Rule 50(b) may be valid on its face, its application in this case violates the Rules Enabling Act's specific prohibition against impairing the substantive rights of a party to a previously vested judgment which had become final at the conclusion of the case due to G.E.'s failure to timely serve and file post-trial motions and appeal. The retroactive application of amended Rule 50(b) also violates the spirit and mandate set forth in Fed.R.Civ.P. 1, requiring a "just, speedy, and inexpensive" determination of actions.

The Ninth Circuit, in retroactively applying amended Rule 50(b), seriously abridged and modified the substantive rights of Hopkins to judgment while enlarging the rights of G.E. by allowing it to avoid compliance with the law then in effect. This represents a departure by the *Schudel* court of the usual and accepted judicial procedure and warrants this Court's exercise of its supervisory

power so as to insure that the lower courts comply with the dictates of 28 U.S.C. Sec. 2072 and the Due Process Clause of the Fifth Amendment.

V.

The Trial court lacked jurisdiction pursuant to Fed.R.Civ.P. 50(b) to grant JMOL in favor of G.E. and order a new trial and the Ninth Circuit erred in failing to ascertain whether the trial court properly ruled as a matter of law that G.E. was entitled to judgment.

The Ninth Circuit and trial court erred by failing to review other jurisdictional issues submitted, most notably the propriety of the trial court's grant of JMOL. Neither court applied the applicable standard of review or case law. Rather, the *Schudel* court merely ruled that since a new trial under Rule 50(b) was ordered, it lacked appellate jurisdiction. Failure of the *Schudel* court to ascertain the propriety of the trial court's Rule 50(b) order represents a departure from usual and accepted judicial procedure, justifying this court's exercise of its supervisory powers.

The *Schudel* court held that the trial court granted JMOL in G.E.'s favor as to certain "issues" in the Hopkins' claim. However, the Ninth Circuit failed to address, under the appropriate standard, *de novo*, whether the trial court properly granted JMOL and if so, whether the trial court acted properly in ordering a new trial. The *Schudel* opinion essentially holds that a trial court may grant JMOL on an "issue" such as one element of damages, and then, regardless of whether the "claim" remained viable, order a new trial. This reasoning is contrary to the express wording of Rule 50(a) (JMOL only appropriate if

"claim" cannot be maintained without "issue" in dispute).

As each of the Hopkins' claims for negligence and loss of consortium were very much alive without the so-called "neurologic" injuries due to overwhelming proof of other respiratory and depressive injuries, the trial court lacked authority to grant "JMOL" and order a new trial.[19] The *Schudel* decision below fails to even address the propriety of such a ruling even though it is jurisdictional in nature.[20] Furthermore, neither the trial court nor the *Schudel* court applied the standard of review that holds JMOL is only appropriate when the evidence permits *one reasonable conclusion as to the verdict* after viewing the evidence in a light most favorable to the Hopkins. *Morgan v. Woessner,* 997 F.2d 1244, 1252 (9th Cir. 1993). This failure is error requiring, at a minimum, that the lower courts be directed to review the propriety of their actions under the applicable standard.

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[19] The new trial was granted pursuant to Rule 50(b) and not Rule 59.

[20] *Venagas v. Wagner,* 831 F.2d 1514, 1519 (9th Cir. 1977) directs that a new trial under Rule 50(b) may only be granted if the "verdict is against the great weight" of the evidence or "it is quite clear that the jury has reached a seriously erroneous result". The trial court failed to articulate any of the applicable standards set forth in *Venagas v. Wagner, supra.*

VI.

The trial court erred in granting JMOL under Fed.R.Civ.P. 50(b) as G.E. failed to preserve issues under Fed.R.Civ.P. 50(a).

Regardless of whether the motions for new trial and JMOL were timely served, the trial court lacked jurisdiction to entertain motions that were not previously raised in G.E.'s Rule 50(a) motion. *Murphy v. City of Long Beach,* 914 F.2d 183, 186 (9th Cir. 1990). Specifically, G.E. conceded that both Hopkins suffered from respiratory illness and Mrs. Hopkins suffered from depression. Nor did G.E. ever challenge the sufficiency of evidence as to Hopkins' loss of consortium claims. More importantly, G.E. failed to specifically address and raise in its Rule 50(a) motions any issues relative to any alleged "neurologic" claims advanced by the Hopkins. The failure of G.E. to challenge the sufficiency of evidence as to the Hopkins' claims in its Rule 50(a) motions deprives the trial court of jurisdiction to entertain Rule 50(b) on matters so omitted. Although this issue is jurisdictional, the Ninth Circuit did not address the propriety of the trial court's grant of JMOL on these issues and whether the claim could still be maintained under Rule 50(b). *Lifshitz v. Walter Drake and Sons, Inc.,* 806 F.2d 1426 (9th Cir. 1986).

VII.

The trial court lacked jurisdiction to vacate the judgment based upon insufficient proof of damages for one injury (neurologic) when sufficient evidence existed of other injuries such as respiratory, depression and loss of consortium.

Fed.R.Civ.P. Rule 51 provides that exceptions to jury instructions must be taken before the case is submitted to the jury. See also Fed.R.Civ.P. 49(a) (failure to designate factual issue in special verdict waives issue after it goes to jury). G.E. did not challenge the instructions given, which asked the jury to determine damages but failed to specify sub-categories of injury such as neurologic and respiratory injuries. In fact, G.E. proposed an instruction nearly identical to that given by the Court. In so doing, G.E. waived its right to claim error in instructing the jury. As G.E. waived this right, it is wholly inappropriate for the trial court to *sua sponte* find that there was instructional error.[21] In this respect, as G.E. failed to preserve any issue relative to the jury instructions and/or move for a directed verdict for insufficient proof of damages on a particular injury, the trial court lacked jurisdiction pursuant to Rule 50(a) and 50(b) to grant JMOL on the so-called unproven issues, vacate the verdict and order a new trial. The *Schudel* decision below failed to address the lack of jurisdiction of the trial court to grant judgment

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[21] The trial court's grant of JMOL and a new trial is based, in the Hopkins case, on the fact that it could not tell what portion of the damages were attributable to proven injuries (i.e. respiratory/depression) and which portion were attributable to the so-called unproven "neurologic" claim.

on this basis, regardless of the timeliness of filing or service of post-trial motions.

Jury verdicts are due considerable deference. *Kern v. Levelor Lorentzen, Inc.*, 899 F.2d 772, 775 (9th Cir. 1990). *Eastman Kodak Company v. Southern Photo Materials Company*, 273 U.S. 359, 71 L.Ed. 684, 47 S.Ct. 400 (1927) (issue of damages having been submitted to the jury, "its determination as to this matter is conclusive"). This line of case law is consistent with a logical interpretation of Rule 50(b), which requires the court to review whether the "claim" (in this case negligence) remains despite absence of proof on an issue. The trial court's reasoning, that a "reasonable" juror must have found Hopkins presented a neurologic claim, failed to recognize that jurors are presumed to follow instructions and would not award damages for injuries unsupported by the evidence. Nor did the trial court recognize its limitations in thereafter dissecting a verdict.[22]

In this case, G.E. had a right and responsibility to request the jury be instructed relative to particular injuries. G.E. waived this right. The trial court is thus precluded from segregating damages by injury and ordering a new trial based upon G.E.'s failure to request appropriate instructions.

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[22] Washington law provides that failure of a jury to attribute damages to particular injuries, absent request by the defendant, prohibits a trial court from thereafter attempting to dissect the jury's verdict. *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 880 P.2d 29 (Wn. 1994). See also *McCord v. Maguire*, 873 F.2d 1271, *amended*, 885 F.2d 650 (9th Cir. 1989).

CONCLUSION

The Ninth Circuit opinion, *Schudel et al. v. General Electric, supra* has decided issues that this Court should decide, namely the retroactive application of an amended civil rule (Rule 50(b)) to a case that had already been completed. Further, the *Schudel* court's opinion is in conflict with decisions of this court and other circuits relative to the proper default rule of retroactivity. The Ninth Circuit *Schudel* court, much like the Ninth Circuit in the *Hughes Aircraft, supra,* ruled that an amended rule of procedure applies retroactively. Along with these important federal questions, this court should exercise its supervisory authority to insure that the lower courts did not exceed their authority under the then existing rules and case law. For reasons set forth above, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted this 20th day of February, 1998.

THOMAS C. PHELAN
Attorney for Petitioners
John and Ruth Hopkins

APPENDIX A

David SCHUDEL, et al., Plaintiffs,

and

Deborah Guaragna-Williams, Plaintiff-Appellee,

v.

GENERAL ELECTRIC CO., a foreign corporation; Kaiser Aluminum And Chemical Corporation, a foreign corporation, Defendants-Appellants.

David SCHUDEL; Daniel Glass; Merlin E. Carlson; Timothy Schudel; Sandra Schudel, husband and wife, and the marital community composed thereof; Kathrene Rae Howell; Craig A. Thompson; John Hopkins; Ruth Hopkins, husband and wife, and the marital community composed thereof, Plaintiff-Appellants,

v.

GENERAL ELECTRIC CO., a foreign corporation; Kaiser Aluminum and Chemical Corporation, a foreign corporation, Defendants-Appellees.

Nos. 95-35092, 95-35145.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 8, 1996.

Decided July 23, 1997.

Joe G. Hollingsworth, Donald W. Fowler and Katharine R. Latimer, Spriggs & Hollingsworth, Washington, DC, and James B. King, Keefe, King & Bowman, Spokane, WA, for defendants-appellants-cross-appellees.

Craig F. Schauermann, Schauermann & Thayer, Vancouver, WA, and Marcia M. Meade, Dawson & Meade,

Spokane, WA, for plaintiffs-cross-appellants David Schudel, Timothy Schudel, Daniel Glass, Sandra Schudel, Merlin Carlson, Kathrene Howell, and Craig Thompson.

Thomas C. Phelan, Vancouver, WA, for plaintiffs-cross-appellants John and Ruth Hopkins.

Craig F. Schauermann, William K. Thayer, and David I. Gedrose, Schauermann & Thayer, Vancouver, WA, for plaintiff-appellee Deborah Guaragna-Williams.

Kit A. Pierson, Jenner & Block, Washington, DC, for amicus curiae.

Appeals from the United States District Court for the Eastern District of Washington; Fred Van Sickle, District Judge, Presiding. D.C. No. CV-92-00081-FVS.

Before BROWNING, D.W. NELSON, and FERNANDEZ, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

This diversity case involves claims for damages from negligence and loss of consortium against defendants General Electric Company and Kaiser Aluminum and Chemical Corporation. Kaiser contracted with General Electric to clean up polychlorinated biphenyls (PCBs) at Kaiser's Trentwood facility in Spokane, Washington. Nine of the ten plaintiffs were employed by General Electric on the cleanup.[1] These plaintiffs alleged they developed various neurological and respiratory problems from

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[1] The tenth plaintiff, Sandra Schudel, did not work at the site, but asserted a loss of consortium claim as the wife of plaintiff Tim Schudel.

exposure to two cleaning solvents, trichloroethane (TCA) and perchloroethylene (Perc).

A jury returned verdicts for the plaintiffs. The defendants moved for JNOV or new trial. The district court affirmed the verdict in favor of one plaintiff, Deborah Williams. The court granted JNOV with respect to respiratory injuries[2] asserted by Merlin Carlson ("Carlson") and with respect to neurological injuries[3] asserted by Kathrene Froese, John Hopkins, and Ruth Hopkins ("the Froese plaintiffs"). The court ordered a new trial with respect to injuries of Carlson and the Froese plaintiffs as to which JNOV had not been granted. Finally, the court granted JNOV on all claims asserted by the five remaining plaintiffs ("the Schudel plaintiffs"[4]).

Defendants appeal the verdict in favor of plaintiff Williams. The other plaintiffs appeal the granting of motions for JNOV or new trial. We address four issues: (1) whether the district court had jurisdiction over the defendants' motions for JNOV or new trial; (2) whether we have jurisdiction to review the district court's order for JNOV and new trial as to Carlson and the Froese plaintiffs; (3) whether the district court erred by granting

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[2] With respect to Carlson, the term "respiratory injuries" applies to respiratory injuries, fatigue, overall body pain, and all other alleged injuries that do not fall within the term "neurological injuries."

[3] With respect to these plaintiffs, the term "neurological injuries" applies to neurological injuries, headaches, rashes, and all other alleged injuries that do not fall within the term "respiratory injuries."

[4] David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson.

JNOV against the Schudel plaintiffs without considering expert testimony the court concluded after trial had been erroneously admitted; and (4) whether the district court properly admitted expert testimony on behalf of plaintiff Williams.

I. District Court Jurisdiction Over the Defendants' Motions for JNOV or New Trial

Plaintiffs argue the district court lacked jurisdiction to consider defendants' motions for JNOV or new trial because the motions were not properly served.[5] When the motions were filed, Federal Rules of Civil Procedure 50 and 59 required the defendants to both file and serve such motions within ten days after entry of judgment.[6] Defendants filed the motions and delivered them to Federal Express for service on the tenth day after judgment. While personal delivery or delivery to the U.S. Postal Service would have satisfied the service requirement, delivery to Federal Express did not. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir.1996).

Rules 50 and 59 were amended in 1995, however, to require only that such motions be filed, not served, no later than 10 days after entry of judgment. *See* Fed.R.Civ.P. 50(b), 59(b). The amendments took effect

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[5] Plaintiff Carlson does not raise this issue; his attorney was timely served.

[6] *See* former Fed.R.Civ.P. 50(b) ("Such a motion [for judgment as a matter of law] may be renewed by service and filing not later than 10 days after entry of judgment."); former Fed.R.Civ.P. 59(b) ("A motion for a new trial shall be served not later than 10 days after the entry of judgment.").

December 1, 1995, and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." S.Ct. Order, Amendments to the Federal Rules of Civil Procedure (Apr. 27, 1995).

This proceeding was pending on December 1, 1995, and no prejudice will result from application of the amendments. All parties have briefed the substantive, non-jurisdictional arguments in detail. No additional action on the part of the court or the parties is required to proceed. We have applied amended federal rules of appellate procedure retroactively in similar circumstances, *see Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir.1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir.1994), and do so here.

II. Appellate Jurisdiction Over Order Granting JNOV and New Trial to Carlson and the Froese Plaintiffs

The district court granted JNOV with respect to respiratory injuries allegedly sustained by Carlson and with respect to neurological injuries allegedly sustained by the Froese plaintiffs. The court vacated the verdicts for these plaintiffs on the ground that they were "tainted" by the evidence of the injuries as to which JNOV had been granted, and ordered a new trial as to Carlson's neurological injuries and the Froese plaintiffs' respiratory injuries. The court certified appeals from the orders for new trial pursuant to Federal Rule of Civil Procedure 54(b).[7]

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[7] Under Fed.R.Civ.P. 54(b), when a lawsuit involves multiple claims or multiple parties, a district court "may direct

We have jurisdiction to review final judgments on entire claims, not on individual issues. An order adjudicating only one issue that is not determinative of an entire claim is not appealable even if a district court certifies the order under Rule 54(b). *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039 (9th Cir.1991). We must determine independently whether a certified judgment is final as to a particular claim.[8] *Id.*

Litigants who advance a single legal theory of liability applied to one set of facts allege a single claim. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976). Carlson and Froese alleged a single claim of negligence, not separate claims for neurological injury and respiratory injury. Similarly, the Hopkinses alleged claims for negligence and loss of consortium, not separate claims for neurological injury and respiratory injury as to each claim.

The district court granted JNOV as to issues related to certain injuries allegedly suffered by plaintiffs because of defendants' negligence. We have no jurisdiction to

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the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[8] Carlson and the Froese plaintiffs argue the standard of review is not *de novo*, but abuse of discretion. We review the certification of an appeal under Rule 54(b) for abuse of discretion. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir.1991). Even though a decision is certified under Rule 54(b), however, we must independently ensure that we are dealing with a final judgment before exercising jurisdiction. *Arizona State Carpenters*, 938 F.2d at 1039.

review the court's rulings on these issues because the claims for negligence and the derivative claims for loss of consortium have not been finally determined. The order granting new trial is also interlocutory and not immediately appealable. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189-90, 66 L.Ed.2d 193 (1980); *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir.1985).[9]

III. Excising Testimony in Granting JNOV

The Schudel plaintiffs argue the district court erred in excising the previously admitted testimony of Dr. Paula Lantsberger before granting defendants' motion for JNOV. We agree.

Dr. Lantsberger was the only witness on causation on behalf of the Schudel plaintiffs. Dr. Lantsberger described symptoms and offered specific testimony regarding causation under two theories: a specific condition causation theory; and a "whole person aggravation" theory. The defendants filed a motion to exclude Dr. Lantsberger's causation testimony prior to trial and a motion to strike

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[9] Carlson and the Froese plaintiffs argue this court has jurisdiction to review a conditional grant of a new trial under Fed.R.Civ.P. 50(c). *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 n. 15 (9th Cir.1989) (stating that appellate courts may review conditional new trial orders because the plain language of Rule 50(c)(1) expressly permits this review). The district court ordered a new trial under Rule 50(b), not Rule 50(c)(1). The order was not conditioned on reversal of the order granting JNOV. Rule 50(b) does not provide for review of non-conditional new trial orders.

the testimony during trial. The district court did not rule on these motions.

After the jury returned verdicts in favor of plaintiffs and defendants moved for JNOV, the court held that Dr. Lantsberger's causation testimony based on the "whole body aggravation" theory had been admitted erroneously. The court then considered the sufficiency of the remaining evidence to support the jury verdicts and granted the motion for JNOV. The court denied defendants' alternative request for a new trial.

Four circuits have held that, when deciding a motion for JNOV, a trial court may not ignore evidence erroneously admitted at trial, reasoning that excluding evidence after the verdict is unfair to a party who may have relied on the determination that the evidence was admissible.[10] "If evidence is ruled inadmissible during the course of the trial, the plaintiff has the opportunity to introduce new evidence. However, when that evidence is ruled inadmissible in the context of deciding a motion for JNOV, the plaintiff, having relied on the evidence already

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[10] *See Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir.1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir.1992); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir.1983); *Midcontinent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir.1973). The Third Circuit has held that such exclusion is proper as long as other evidence relating to the same issue was not barred during trial as cumulative, reasoning that the moving party has a competing interest in litigating a case only once and expressing doubt that litigants would hold back significant evidence at trial. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1199-1200 (3d Cir.1993).

introduced, is unable to remedy the situation." *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir.1993).

We recently indicated we would abide by the same rule. *See Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 993 (9th Cir.1997). We now hold that when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing. *Jackson*, 980 F.2d at 696 n. 4.

The district court properly concluded that Dr. Lantsberger's testimony based on the "whole person aggravation" theory of causation did not meet the standard of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (*Daubert I*), (outlined in Part IV of this opinion), and should have been excluded. Once the jury rendered its verdict based on the improperly admitted evidence, however, the district court erred in excising that evidence when ruling on the motion for JNOV. Considering all the evidence admitted at trial, including Dr. Lantsberger's "whole person aggravation" theory testimony, we conclude there was sufficient evidence to support the jury verdicts in favor of the Schudel plaintiffs.

Nonetheless, these verdicts may not stand. The district court erred in denying defendants' motion for new trial. A new trial should be granted when the erroneous admission of evidence affected the substantial rights of the parties. Fed.R.Civ.P. 61. Dr. Lantsberger's testimony was the only evidence of causation; its erroneous admission was undoubtedly prejudicial.

IV. The Defendants' Appeal

Defendants argue the neurological symptom causation testimony of Dr. William Morton, Dr. Daniel Goldstein, and Dr. Lantsberger underlying the jury verdict for Deborah Williams was not admissible under Federal Rule of Evidence 702.[11]

A.

The Supreme Court held in *Daubert I*, 509 U.S. at 590-91, 113 S.Ct. at 2795-96, that Rule 702 requires the trial judge to determine that proposed scientific expert testimony will be both reliable and relevant. *See also Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1313 (9th Cir.1995) (*Daubert II*).

Scientific knowledge is reliable if it is "ground[ed] in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation."

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[11] Defendants also argue the trial court should have held a pretrial hearing on the admissibility of the testimony of Williams' experts. Because we conclude the expert testimony should have been excluded, we do not decide whether a pretrial hearing should have been held.

Daubert I, 509 U.S. at 590, 113 S.Ct. at 2795. In determining reliability, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595, 113 S.Ct. at 2797.

Evidence of scientific knowledge is relevant if the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593, 113 S.Ct. at 2796; *see also Daubert II*, 43 F.3d at 1315 (evidence of scientific knowledge must "logically advance[ ] a material aspect of the proposing party's case"). A court's determination of relevance must consider the applicable substantive standard. *See id.* at 1320. Under Washington tort law, a plaintiff must show that the "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wash.2d 814, 440 P.2d 823, 830 (1968). This is virtually the same as the standard under California tort law applied in *Daubert II*. *See* 43 F.3d at 1320. Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries, i.e., that use of the drug more than doubled the likelihood the injuries would occur. 43 F.3d at 1320-22.

B.

The district court approved reliance by Williams' experts on interview data collected by Diane Nebel.

Nebel contacted many of the workers at the Kaiser facility after one of the project supervisors fell ill with Legionnaire's disease. Nebel found no evidence of a Legionnaire's outbreak, but did discover that some of the workers, including the plaintiffs, suffered from various medical symptoms. The data collected in Nebel's Legionnaire's disease investigation provided the basis for much of the scientific testimony presented by Williams' experts at trial.

The district court acted within its discretion in approving the use of this data by Williams' expert witnesses. Dr. Goldstein and Dr. Lantsberger both testified the data was of the type toxicologists consider reliable and regularly rely upon. *See* Fed.R.Evid. 703.

Dr. Morton testified that plaintiff Williams suffered from solvent-induced toxic encephalopathy which "more probably than not" was caused by exposure to Perc and TCA. Dr. Morton's testimony met *Daubert*'s relevance requirement. However, it did not meet *Daubert* 's requirement of reliability.

Dr. Morton's conclusions were based on extrapolation from studies that: (1) involved organic solvents other than TCA or Perc; and (2) examined long-term exposure at relatively low chemical concentrations or short-term exposure at very high concentrations, rather than the short-term, moderate-level exposure sustained by Williams. Dr. Morton did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed, the testimony indicated small differences in molecular structure often have significant consequences.

As to differences in length and intensity of exposure, the district court erroneously reasoned that because there was evidence that acute exposure to TCA and Perc can cause toxic encephalopathy, whether Williams' exposure was sufficient to cause her symptoms was a question for the jury. Williams' exposure was neither long enough nor intense enough to fall within the ranges described in the studies Dr. Morton relied upon. Extrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.[12]

Dr. Goldstein's testimony suffered from similar deficiencies. Dr. Goldstein conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic. He also testified that it would be improper to infer conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents, and that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship.

Dr. Goldstein acknowledged that the biochemical mechanism of neurotoxicity from TCA and Perc has not been demonstrated. Only two studies cited by Dr. Goldstein involved TCA and Perc, and neither met *Daubert* standards. The Altman study found no relationship between exposure to Perc and the toxic encephalopathy or loss of consciousness alleged by the plaintiffs. The

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[12] Given our analysis of the admissibility of Dr. Morton's testimony, we need not consider defendants' contention that his testimony should have been excluded because testimony based on case reports is not admissible under *Daubert*.

Kalifant study involved long-term (7-15 years), repetitive exposures to TCA at high levels.

Dr. Lantsberger's testimony failed to meet *Daubert* 's relevance requirement. She testified it was only a "possibility," not a "probability," that Williams suffered organic brain damage from exposure to solvents at the facility. Dr. Lantsberger admitted she could not testify to a specific cause and effect relationship between Williams' exposure and health problems. She relied instead on a "whole person aggravation" theory without establishing that the theory had a scientific basis.

Dr. Lantsberger's testimony regarding the hazards of TCA and Perc was inadmissible under *Daubert*. Dr. Lantsberger, like Dr. Goldstein, relied on the Altman and Kalifant articles to reach her neurotoxicity conclusions, and like Dr. Goldstein, admitted that medical science has not determined the effects of short-term exposure to the solvents involved.

Plaintiff Williams points to other expert witnesses whose testimony was not challenged by defendants. Only one of these experts provided causation testimony, and his testimony related only to Williams' respiratory injury.

Considering all the evidence admitted at trial, including the erroneously admitted evidence, we hold the district court properly denied defendants' motion for JNOV with respect to Williams. Admission of the challenged expert testimony was prejudicial, however, because it was the sole causation evidence with respect to Williams' neurological symptoms. Accordingly, we vacate the judgment entered on the jury verdict, reverse the district

court's denial of defendants' motion for a new trial, and remand.

CONCLUSION

We lack jurisdiction to review the district court's grant of JNOV and new trial as to plaintiffs Merlin Carlson, Kathrene Froese, John Hopkins, and Ruth Hopkins, and DISMISS their appeals.

We REVERSE the grant of JNOV and the denial of the motions for new trial as to plaintiffs David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson, and REMAND.

We find plaintiff Deborah Williams' neurological expert testimony on causation inadmissible, VACATE the judgment entered on the jury verdict in her favor, REVERSE the denial of the motion for new trial, and REMAND.

DISMISSED in part, and VACATED, REVERSED, and REMANDED in part. No costs allowed.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID SCHUDEL, et al., Plaintiffs, and DEBORAH GUARAGNA-WILLIAMS, Plaintiff-Appellee, v. GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation, Defendants-Appellants.	)	No. 95-35092 D.C. No. CV-92-00081-FVS

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON, TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; RUTH HOPKINS, husband and wife, and the marital community composed thereof,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Defendants-Appellees.

No. 95-35145

D.C. No. CV-92-00081-FVS

ORDER

(Filed Nov. 24, 1997)

Before: BROWNING, D.W. NELSON, and FERNANDEZ, Circuit Judges

The petition for rehearing of Merlin E. Carlson, Jr. is DENIED.

The panel has voted to DENY the petition for rehearing of David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Deborah Williams, and Kathrene Froese. Judge Browning and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The panel has voted to DENY the petition for rehearing of John Hopkins and Ruth Hopkins. Judge Browning

and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al, et ux, Plaintiffs, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendants.	No. CS-92-081-FVS ORDER RE POST-TRIAL MOTIONS (Filed Nov. 25, 1994)

BEFORE THE COURT are certain post-trial motions. They were decided without oral argument on November 22, 1994. *See* Local Rule ("LR") 7(h)(3).

I. PLAINTIFFS' MOTION TO STRIKE

A. Background

Judgment was entered on July 13, 1994. On July 27, 1994, the defendants filed motions for both judgments as a matter of law and a new trial. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59. That same day, copies of the motions were mailed to opposing counsel via Federal Express.

The plaintiffs now move the Court to strike the defendants' Rule 50(b) and Rule 59 motions. They argue that the motions were not served in a timely manner.

B. Ruling

Motions for judgment as a matter of law and for a new trial must be filed and served within ten days of the date judgment is entered. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59(b). In calculating the ten-day deadline, neither intermediate weekends nor legal holidays are counted. Fed.R.Civ.P. 6(b). Thus, the defendants had until the twenty-seventh of July to file and serve their Rule 50(b) and Rule 59 motions.

It is undisputed that the defendants mailed copies of their motions to all opposing parties by Federal Express on July 27, 1994. Since "[s]ervice by mail is complete upon mailing," Fed.R.Civ.P. 5(b), the defendants' motions would appear to have been both filed and served prior to the deadline.

The plaintiffs disagree. They contend that sending documents by Federal Express does not constitute "mailing" within the meaning of Rule 5(b).

Notwithstanding the plaintiffs' disagreement, they have failed to cite a single decision adopting their interpretation of Rule 5(b). They are forced to rely upon *Transco Leasing Corp. v. United States*, 992 F.2d 552, 554 n.2 (5th Cir. 1993), a case in which the Fifth Circuit cautioned, in dicta, "that service by Federal Express may not be service by mail."[1]

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[1] Professors Wright and Miller mention *Transco*, but do not analyze the issue. 4A C. Wright, A. Miller, *Federal Practice and Procedure*, § 1148 (2d ed. Supp. 1994).

The defendants, by contrast, have cited two district courts decisions that considered – and rejected – the plaintiffs' position. Both held that Rule 5(b) does not require mailing through the United States Postal Service. *United States v. Certain Real Property & Premises Known As 63-29 Trimble Rd.*, 812 F.Supp. 332, 334 (E.D.N.Y. 1992); *Edmond v. United States Postal Serv.*, 727 F.Supp. 7, 11 (D.D.C. 1989), *rev'd on other grounds*, 949 F.2d 415 (1991).

Here, it was reasonable for the defendants to believe that the method of service they utilized would be more prompt than ordinary first class mail, and every bit as reliable. Given the plaintiffs' failure to cite authority supporting their interpretation of Rule 5(b), and the fact that two district courts have specifically rejected their position, the plaintiffs' motion to strike will be denied.

II. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW.

The defendants offer six reasons why the Court should grant judgment as a matter of law. Fed.R.Civ.P. 50(b). They are as follows: (1) the plaintiffs' experts based their opinions upon unreliable data; (2) certain experts were not qualified, and their opinions do not constitute "scientific knowledge" within the meaning of Rule 702; (3) even if the disputed opinions are admissible, they fail to establish causation; (4) under Washington law, many of Dr. Lantsberger's opinions regarding causation are legally insufficient; (5) the plaintiffs were loaned servants; and (6) Kaiser owed no duty of care to the plaintiffs.

A. Reliability/Loaned Servant/Duty

Not all of the defendants' arguments require in-depth analysis. The first, fifth, and sixth may be disposed of rather quickly.

1. *Reliability of Data*

The Court refused to admit the "Nebel" exhibits because they were hearsay, and the plaintiffs had not demonstrated the applicability of an exception to the hearsay rule. Moreover, even if an exception had applied, the exhibits were cumulative. (Tr. at 5790-91).

Later, the defendants attempted to impeach Craig Thompson with statements he made to Ms. Nebel. *See* Fed.R.Evid. 801(d)(2)(A) (admission by party-opponent). The plaintiffs objected. (Tr. at 5970.) In sustaining the objection, the Court said, in part, "They [the Nebel exhibits] were not admitted because of concerns about reliability." (Tr. at 5984.)

The defendants have interpreted the court's statement as a finding that the Nebel exhibits were unreliable. When both sections of the transcript are read in context, it is evident that no such finding was intended.

2. *Loaned Servant*

The jury was instructed properly on the question of "loaned servant." Since there is substantial evidence to support the jury's determination that the plaintiffs were not loaned servants, there is no basis for granting the defendants judgment on this issue.

3. Duty of Care

With Respect to the question of "duty," the defendants have cited no new authority. The Court is satisfied that a duty existed.

B. Admissibility of Certain Expert Opinions

The second argument focuses on the admissibility of opinions given by Drs. Lantsberger, Goldstein, and Morton. The defendants submit that these three witnesses were not qualified to render opinions regarding toxic encephalopathy, and that their theories of organic brain damage are not supported by the scientific literature.

Both prongs of the second argument were raised prior to (and during) trial. After reviewing the materials presented by the parties, the Court ruled against the defendants on both issues.

Since then, the Ninth Circuit has decided two civil cases, the outcome in each hinging on the admissibility of expert testimony. Both opinions discuss the requirements of Rule 702 in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Both agree that expert testimony may not be admitted unless the trial judge first determines that the expert's conclusions are based upon scientific knowledge. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124 (9th Cir. 1994); *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

Although *Hopkins* and *Claar* are clearly relevant here, neither dictates a result different than that previously

reached by the Court. As a result, the Court declines to disturb its prior rulings regarding toxic encephalopathy.

C. Sufficiency of Certain Expert Opinions (Background)

The third and fourth arguments challenge the sufficiency of certain expert opinions – primarily those of Dr. Lantsberger. Because this part of the defendants' Rule 50(b) motion attacks sufficiency, it is necessary to describe the disputed opinions in some detail.

1. Dan Glass

Mr. Glass reported a number of symptoms to Dr. Paula Lantsberger, including heart palpitations, headaches, memory loss, and respiratory problems. Dr. Lantsberger was the only expert who attempted to link any of Glass' specific symptoms to work at Kaiser.

* * *

probable than not basis, I think that her conditions as we have outlined them have been aggravated by her exposure at, by her work at the Kaiser plant." (Tr. at 3145.)

8. Ruth Hopkins/John Hopkins

The defendants concede that the Hopkins' principal claims involved respiratory injuries. The defendants argue, however, that the Hopkins also maintained a claim for brain damage. The record reflects the following concerning the defendants' contention:

During direct examination, Dr. Samuel Milham was asked by counsel for the Hopkins to read the conclusion of a study to the jury. Milham relied, in part, "[T]he *severe neurologic injuries suffered by the workers in the incident* are sobering reminders that easily preventable organic solvent related occupational illness continues to occur in a highly developed country in the late 20th century." (Tr. at 1436.) (Emphasis added.)

In addition, the Hopkins' attorney participated actively in the cross-examination of Dr. Neil Rosenberg, the defendant's expert on the subject of solvent-induced organic brain damage. (Tr. at 9473-89, 9529-40.) He questioned Rosenberg about neurologic injury in general, (*see, e.g.*, Tr. at 9481-82), and Mrs. Hopkins' case in particular – including magnetic resonance imaging ("MRI".) (Tr. at 9538-39.) He also had Rosenberg confirm that his testimony had nothing to do with the "pulmonary aspect of this case." (Tr. at 9540.)

During closing, the Hopkins' attorney devoted most of his time to pulmonary complaints. He did not restrict himself to that subject, however. For example, he asked the jury to think about Ruth Hopkins' "memory problems." (Tr. at 12022.) Later, he said, "These chemicals can hurt you. They can hurt your organs. They can hurt your brains." (Tr. at 12028.)

It was at this point that he asked the jury to discount Dr. Rosenberg's testimony about magnetic resonance imaging and Toluene abusers. In essence, he argued that his clients' exposure to organic solvents was distinguishable from that of the Toluene abusers Dr. Rosenberg had

described, thereby implying that it was of no significance that Mrs. Hopkins's MRI was normal. (Tr. at 12028-29.)

D. Sufficiency of Certain Expert Opinions (Analysis)

A motion for judgment as a matter of law may be granted when "a party has been fully heard with respect to an issue and there is no *legally sufficient evidentiary basis for a reasonable jury to have found for that party* with respect to that issue. . . . " Fed.R.Civ.P. 50(a)(1). *See Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir.1993). The moving party must demonstrate that insofar as the verdict is concerned, the evidence permits but one reasonable conclusion. *Conner v. Sakai*, 15 F.3d 1463, 1467 (9th Cir.1993).

* * *

and "overall body pain."

With respect to respiratory complaints, Dr. Lantsberger was forced to concede that Mr. Carlson does not have Reactive Airways Dysfunction Syndrome or industrially induced asthma. Similarly, with respect to "bone pain and joint aches," she could only say, "I don't know what caused these guys to have the aches and pains, but I do know that a significant number of the workers did have them." Given the record, a reasonable jury could not have found for Mr. Carlson on his non-neurological claims.

7. Deborah Williams

Ms. Williams presented claims for organic brain damage and respiratory injury. A number of experts testified on her behalf. Although Dr. Lantsberger opined that Ms.

Williams' "conditions" were aggravated by work at Kaiser, it is questionable whether her testimony would have had appreciable impact on the jury's verdict.

8. Ruth Hopkins/John Hopkins

Based upon the evidence presented by the Hopkins, their cross-examination of Dr. Rosenberg, and the manner in which they argued their case, a reasonable jury would have assumed the Hopkins were making a claim for brain damage. Granted, the jury may not have viewed it as the Hopkins' principal claim, but the jury would have understood that it was a very real part of the Hopkins' case. Therein lies the problem. Having chosen to make a claim for solvent-induced brain damage, the Hopkins were obligated to prove it. They failed to do so. A reasonable jury could not have found that the Hopkins suffered neurologic injuries as a proximate cause of the defendants' negligence. The defendants are therefore entitled to judgment as a matter of law on that particular claim.

E. Sufficiency of Certain Expert Opinions (Conclusion)

In view of the foregoing, the defendants are entitled to judgment as a matter of law on a number of claims. They include the following: all claims asserted by Dan Glass, David Schduel, Craig Thompson and Tim Schudel; all non-respiratory claims asserted by Kathrene Froese; all non-neurological claims asserted by Merlin Carlson; and all non-respiratory claims asserted by the Hopkins.

Although several claims must be dismissed, several remain. The next question is whether a new trial is necessary.

Approximately six weeks prior to trial, the Court asked the plaintiffs to list their claims against the defendants. (Order Re *Daubert* Procedure (Ct. Rec. 326) at 7.) The plaintiffs declined to do so. (Plaintiffs' Lists of Claims (Ct. Rec. 334).) Instead, they presented the jury with a long list of symptoms, only some of which could be connected to the plaintiffs' work at Kaiser on a more probable than not basis. Furthermore, when it came time to instruct the jury, the plaintiffs rejected a suggestion that the jurors be asked to

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APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHRENE FROESE; CRAIG A. THOMPSON; DEBORAH GUARANGA WILLIAMS; and JOHN HOPKINS and RUTH HOPKINS, husband and wife and the marital community composed thereof, Plaintiff(s), vs. GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, Defendant(s).	JUDGMENT IN A CIVIL CASE CASE NUMBER: CS-92-0081-FVS (Filed Jul. 13, 1994)

This action came on for trial before the Court and a jury, honorable Fred Van Sickle, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Tim Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Fifty-One Thousand Two Hundred Seventy

Dollars ($1,051,270.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Sandra Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Fifty Thousand Dollars ($50,000.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Three Hundred Forty-Eight Thousand Twenty Dollars ($1,348,020.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Four Thousand Forty Dollars ($1,404,040.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric

Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on his claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Merlin Carlson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Two Million Seven Hundred Seventy-Five Thousand Seven Hundred Sixty-Eight Dollars ($2,775,768.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Daniel Glass, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Nine Hundred Fifty-Six Thousand One Hundred Forty-Six Dollars ($956,146.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Deborah Guarangna Williams, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Nine Hundred Seven Thousand Seven Hundred Eighty-Three Dollars ($1,907,783.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Kathrene Froese, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Fifty-Nine Thousand Three Hundred Thirty-Two Dollars ($1,459,332.00), with

interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, David Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million One Hundred Thirty Thousand Seven Hundred Eleven Dollars ($1,130,711.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Craig Thompson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Five Hundred Fifty-Six Thousand One Hundred Ninety-Nine Dollars ($556,199.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

Dated: July 13, 1994 JAMES R. LARSEN, Clerk

by: /s/ Charles L. Randazzo
Charles L. Randazzo
Deputy Clerk

APPENDIX E

FILED IN THE
U.S. DISTRICT
EASTERN DISTRICT OF WASHINGTON

Nov. 25, 1994

JAMES R. LARSEN, CLERK
___ DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al., Plaintiff, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendant.	AMENDED **JUDGMENT IN A CIVIL CASE** CS-92-081-FVS

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion to strike defense motions as untimely is **DENIED**. The defendants' motion to strike plaintiffs' memorandum is **DENIED**. The plaintiffs' motion to strike reply is **DENIED**. The defendants' motion for judgment as a matter of law is **DENIED IN PART and GRANTED IN PART.** The judgments entered herein are re-opened and modified as follows: a) The defendants are **GRANTED**

judgment as a matter of law on all claims asserted by Dan Glass, David Schudel, Craig Thompson and Tim Schudel. Those claims are **DISMISSED WITH PREJUDICE**. b) The defendants are **GRANTED** judgment as a matter of law on all non-respiratory claims asserted by Kathrene Froese. Those claims are **DISMISSED WITH PREJUDICE**. c) The defendants are **GRANTED** judgment as a matter of law on all non-neurological claims asserted by Merlin Carlson. Those claims are **DISMISSED WITH PREJUDICE**. d) The defendants are **GRANTED** judgment as a matter of law on all non-respiratory claims asserted by Ruth Hopkins and John Hopkins. Those claims are **DISMISSED WITH PREJUDICE**. The defendants are **GRANTED** a new trial on all remaining claims. The defendants' motion for new trial or alternative relief is **DENIED**. The plaintiffs' timely request for attorneys' fees and costs shall have the same effect under FRAP 4(a)(4) as a Rule 59 motion, and the period for filing a notice of appeal shall be extended accordingly. The plaintiffs' request for attorneys' fees and costs is **DENIED IN PART and GRANTED IN PART**. Ms. Deborah Williams is directed to submit a revised cost bill. Defendant Kaiser Aluminum and Chemical Corporation's motion to amend or correct judgments is **GRANTED**. The judgments entered herein shall refer to "Kaiser Aluminum and Chemical Corporation" **NOT** "Kaiser Aluminum Corporation." The plaintiffs' motion for order shortening time is **DENIED**. The plaintiffs' motions for order setting hearing on discovery abuses are **DENIED**. The defendants'

motion for stay of proceedings to enforce judgments is **DENIED**.

Dated: November 25, 1994 JAMES R. LARSEN, Clerk

by: /s/ Annie Smith
Annie Smith,
Deputy

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al., et ux., Plaintiffs, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendants.	No. CS-92-081-FVS ORDER RE MOTIONS TO AMEND AND CERTIFY (Filed Jan. 17, 1995)

BEFORE THE COURT are motions to amend Order Re Post-Trial Motions,[1] and to authorize appeals from it. All motions were heard without oral argument on January 13, 1995.

CLAIM OF SANDRA SCHUDEL

Relief Requested

Mr. Timothy Schudel alleged that he suffered various injuries while working on the Kaiser cleanup project. His wife, Sandra Schudel, brought separate claims for loss of consortium based upon the injuries her husband allegedly suffered. Mrs. Schudel's loss-of-consortium claims were not addressed in the Order Re Post-Trial Motions. Now that Timothy Schudel's claims have been

[1] The order was entered on November 25, 1994. It is docketed as pleading 571.

dismissed with prejudice, the defendants move the Court to dismiss Sandra Schudel's loss-of-consortium claims.

Ruling

The defendant's motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants will be dismissed with prejudice.

MOTION FOR NEW TRIAL

Relief Requested

After the jury returned its verdicts, the defendants moved for a new trial (Ct. Rec. 486). Except in the case of Deborah Williams, the Court did not address the merits of the defendants' motion. (In her case, the defendant's motion was denied.) The defendants now move the Court, pursuant to Fed.R.Civ.P. 50(c)(1), to issue a conditional ruling with respect to the other plaintiffs.

Ruling

The defendant's motion for new trial will be denied with respect to all plaintiffs.

HOPKINS' MOTION TO RECONSIDER

Relief Requested

Plaintiffs Ruth Hopkins and John Hopkins move the Court to reconsider its decision vacating the verdicts in their favor and ordering a new trial. If the Court declines to do so, Ruth Hopkins moves the Court to clarify its

order regarding her claims. She notes that the Order Re Post-Trial Motions dismisses all non-respiratory claims. She wants to know whether the Court intended to preclude her from recovering for depression (allegedly) spawned by her respiratory problems.

Ruling

The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except with respect to Ruth Hopkins's request for clarification of the Court's ruling regarding recovery of damages for depression. If, upon retrial, Ruth Hopkins proves that she suffered depression as a result of respiratory problems caused by the defendants, she may recover damages for her depression.

RULE 54(b)

Relief Requested

Both sides move the Court to authorize appeals of the judgments adjudicating the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel. Fed.R.Civ.P. 54(b) (1994).[2] In addition, plaintiffs Kathrene Froese, Merlin Carlson,

---

[2] Rule 54(b) states, in pertinent part, "When more than one claim for relief is presented in an action, . . . , or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Ruth Hopkins, and John Hopkins move the Court to permit them to appeal the order granting a new trial.

Analysis

Under Rule 54(b), the Court must first determine whether a final judgment exists. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7, 100 S.Ct. 1460, 1464, 64 L.Ed.2d 1 (1980). Once that task has been completed, the Court must decide whether there is any just reason to delay the appellate process. *Id.* at 8, 100 S.Ct. at 1465. In doing so, the Court must consider both the administrative impact of releasing claims for appeal, and "the equities involved." *Id.* at 8, 100 S.Ct. at 1465.

1. Existence of final judgments

The claims of ten plaintiffs are at issue in this action. Now that the Court has entered its Order Re Post-Trial Motions, the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel have been fully adjudicated. What of the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins?

In its order, the Court ruled that these four plaintiffs (*i.e.*, Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins) could not recover damages for certain (alleged) injuries. The judgments which had been entered in their favor were vacated, and a new trial was ordered. In other words, the order limited damages, but left their negligence claims otherwise unresolved pending a new

trial. As a result, insofar as Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins are concerned, the order is not a final judgment. *See Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir.1991) (holding that an order dismissing a claim for punitive damages was not final).

2. No just reason for delay

(a) Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel

The record is now complete with respect to these five claims. Nothing that might occur in district court will affect appellate review of these dismissals. It is now up to the Court of Appeals to determine whether each dismissal was proper. In doing so, the Court of Appeals will have to review each claim separately. Consequently, authorizing these five plaintiffs to appeal will not result in unwarranted duplication of appellate effort.

(b) Deborah Williams

The verdict in favor of Ms. Williams was upheld. Appellate review of that verdict will facilitate adjudication of those claims which must be retried.

3. The four remaining claims

The Court ordered a new trial with respect to the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins. An order granting a new trial is interlocutory. As a general rule, it is not appealable under

28 U.S.C. § 1291. *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir.1985); *Eaton v. National Steel Products Company*, 624 F.2d 863, 864 (9th Cir.1980). There is an exception to that rule, however. An order granting a new trial may be appealed if the district court no longer had jurisdiction to do so. *See Eaton*, 624 F.2d at 864.

Here, the plaintiffs moved to strike the defendants' post-trial motions, arguing that they were untimely. The Court denied the plaintiffs' motion, and granted post-trial relief. Should the Court of Appeals disagree with this Court's assessment of the timeliness of the defendants' post-trial motions, the Court of Appeals will have to determine whether this Court had authority to enter its Order Re Post-Trial Motions. Thus, the *Eaton* exception applies.

Ruling

There is no just reason to delay appeal of the Order Re Post-Trial motions.

COST BILLS

Plaintiff Deborah Williams has submitted a revised cost bill. No objections have been filed. Ms. William's request will therefore be approved.

The defendants are now the prevailing parties with respect to the claims asserted by Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel. The defendants move the Court (Ct. Rec. 274) for an order indicating that they have ten days from Rule

54(b) certification to file cost bills. Their request will be granted.

IT IS HEREBY ORDERED:

1. The defendants' motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants are dismissed with prejudice.

2. The defendants' motion for a conditional ruling (Ct. Rec. 574) is granted in part. The defendants' prior motion for a new trial (Ct. Rec. 486) is denied with respect to all plaintiffs.

3. The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except as indicated above.

4. The parties respective motions for Rule 54(b) certification (Ct. Recs. 574, 577) are granted.

(a) There is no just reason to delay appellate review of the Court's Order Re Post-Trial Motions (Ct. Rec. 571); and

(b) Since the Clerk has already entered judgment as directed by the Order Re Post-Trial Motions, that judgment (Ct. Rec. 572) will become the final judgment for purposes of Rule 54(b) upon entry of this order.

5. Deborah Williams's cost bill is approved.

6. The defendants are to submit a cost bill with respect to the claims of Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel within ten days of entry of this order.

7. Any other pending motions are denied as moot.

IT IS ORDERED. The Clerk is hereby directed to file this order, furnish copies to counsel, and close the case.

DATED this 13 day of January 1995.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District Judge

APPENDIX G

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

28 U.S.C. § 2072. **Rules of procedure and evidence; power to prescribe.**

* * *

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Fed.R.Civ.P. 50(a)

(a) Judgment as a Matter of Law.
(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . that cannot under the controling law be maintained . . . without a favorable finding on that issue.

(1994 version).

Fed.R.Civ.P. 50(b)

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion

may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59(b) may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(1994 version).

Fed.R.Civ.P. 50(b)

(b) Renewing Motion for Judgment After Trial: Alternative Motion for a New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

1. If a verdict was returned:

   (A) Allow the judgments to stand,

   (B) Order a new trial, or

(C) Direct entry of judgment as a matter of law; or

2. If no verdict was returned:

(A) Order a new trial, or

(B) Direct entry of judgment as a matter of law.

(Amended version created by order dated April 27, 1995 amending rule effective 12/1/95).

Fed.R.Civ.P. 59(b) and (d)

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(1994 version).

Fed.R.Civ.P. 59(b) and (d)

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

* * *

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(Amended version of rule effective December 1, 1995).

The Supreme Court order dated April 27, 1995, found at 131 L.Ed.2d xcii, provides as follows:

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 50, 52, 59, and 83.

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1995, and shall govern all proceedings in civil cases thereafter commenced, and, insofar as just and practicable, all proceedings and civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code [28 U.S.C.S. Section 2072].

AMENDMENT V OF UNITED STATES CONSTITUTION

CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy in life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII OF UNITED STATES CONSTITUTION

CIVIL TRIALS

In Suits of common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(2) (2) (1)

Supreme Court, U.S.
FILED
MAR 25 1998
CLERK

Nos. 97-1382, 97-1386 and 97-1410

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,
Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governed the admissibility of the scientific evidence in this diversity case and properly applied those standards?

2. Whether the court of appeals could and properly did apply amendments to the Federal Rules of Civil Procedure to a then-pending case as expressly authorized by the Rules and the enacting Order of this Court?

LIST OF PARTIES

Petitioners in No. 97-1382 are David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Kathrene Rae Howell Thompson Froese, and Craig Thompson [hereinafter, collectively, "Schudel"] and Deborah Guaranga Williams [hereinafter, "Williams"]. Schudel was plaintiff in the district court and appellant in the court of appeals. Williams was plaintiff in the district court and appellee in the court of appeals.

Petitioners in No. 97-1386 are Ruth Hopkins and John Hopkins [hereinafter, jointly, "Hopkins"]. Hopkins incorrectly identifies himself as having been appellee in the court of appeals. (Hopkins Pet. at iii.) Hopkins, plaintiff in the district court, was appellant in the court of appeals.

Petitioner in No. 97-1410 is Merlin E. Carlson, Jr. [hereinafter, "Carlson"]. Carlson was plaintiff in the district court and appellant in the court of appeals.

Respondents are the General Electric Company and Kaiser Aluminum and Chemical Corporation [hereinafter, jointly, "General Electric"]. Petitioners incorrectly identified one of the Respondents as Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation (Hopkins Pet. at iii; Schudel/Williams Pet. at ii.) Kaiser Aluminum Corporation is not and has not been a party to the proceeding.

RULE 29.6 LIST

The General Electric Company is a publicly held corporation with no parent companies. Its nonwholly owned subsidiaries are CAMCO, Inc. (Canada); Credit Del'Est; Finax FS AB; Finax KK AB; Gate Finance Corporation; GE Capital Aviation Services, Ltd; GE Capital Mortgage Services, Inc.; GE Capital (NZ) Ltd. (New Zealand); GE Capital PTY LTD. (Australia); GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; General Electric Capital Corporation; General Electric Capital Services, Inc.; General Electric Credit International, N.V.; GNA Corporation; Imaging Financial Services, Inc.; International GE Capital Corporation; Mercur Bank (Austria); Montgomery Ward & Company, Inc.; Outlet Broadcasting, Inc.; and Service Bank GmbH.

Kaiser Aluminum and Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation. Maxxam, Inc. is, in turn, the parent of Kaiser Aluminum Corporation. Kaiser Aluminum and Chemical Corporation has no nonwholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-1382, 97-1386 and 97-1410

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the court of appeals is published at 120 F.3d 991 (CA9 1997) and is reproduced in its entirety in each of Petitioners' Appendices. (Schudel/Williams Pet. App. at 1-15; Hopkins Pet. App. at 1-15; Carlson Pet. App. at A-1-A-15.) The opinion of the district court is unpublished and is reproduced in its entirety in the Schudel/Williams Appendix and the Carlson Appendix, and approximately ten of its 43 pages are reproduced in the Hopkins Appendix. (Schudel/Williams Pet.

App. at 19-61; Carlson Pet. App. at A-16-A-44; Hopkins Pet. App. at 19-28.) [Hereinafter, for the Court's convenience, all Appendix citations ("Pet. App.") refer to the Schudel/Williams Appendix.]

JURISDICTION

The court of appeals held that it lacked jurisdiction to review the district court's post-trial rulings and subsequent grant of a new trial as to Carlson, Hopkins, and one of the Schudel plaintiffs (Froese). The court of appeals dismissed their appeals. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the district court's post-trial rulings and subsequent grant of judgment against the remaining Schudel plaintiffs. The court of appeals reversed those judgments, reversed the denial of General Electric's alternative motion for new trials, and remanded. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the judgment entered on the jury verdict in favor of Williams. The court of appeals found Williams' expert testimony on causation inadmissible, vacated her judgment, reversed the denial of General Electric's motion for new trial, and remanded. (Pet. App. at 15.)

No party has a judgment at this time. This Court may accept a writ of certiorari to review the various rulings of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1998).

STATEMENT OF THE CASE

In the fall of 1988, Kaiser Aluminum and Chemical Corporation contracted with the General Electric Company to strip polychlorinated biphenyls ("PCBs") from five utility rooms in Kaiser's Trentwood facility outside of Spokane, Washington. The bulk of the work was manual labor—scraping and scrubbing down walls and pipes with detergents and solvent degreasers which would adsorb the PCBs. The job lasted about eight weeks. In this diversity

case, nine plaintiffs (petitioners here) alleged they developed myriad neurological and respiratory problems from working with those detergents and solvents.[1]

A. District Court Proceedings

Several months before trial, General Electric filed extensive pre-trial motions, including challenges to the admissibility of certain scientific evidence in accordance with Federal Rules of Evidence 104(a) and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). General Electric challenged in particular the soundness and scientific reliability of, and the methodology employed by plaintiffs' experts in reaching, the unprecedented opinion that plaintiffs collectively suffered from disabling solvent-induced encephalopathy, *i.e.*, diffuse brain damage, secondary to brief occupational exposures to products containing the solvents trichloroethane ("TCA") and perchloroethylene ("Perc").

Although it never held the "*Daubert* hearing" requested by all parties, the district court eventually ruled that a "question of fact" existed as to whether, and how, plaintiffs had been neurologically injured by solvents. The court made no findings at any time as to whether, or how, the methodology underlying plaintiffs' experts' theories of causation rose to the level of "scientific knowledge" required by *Daubert* in the absence of any accepted methodology or supporting literature.

At trial, plaintiffs' expert witnesses testified over General Electric's objections that plaintiffs as a group had suffered "brain damage" and other neurological injuries ranging from "toxic encephalopathy" to "whole person

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[1] The personal injury claims included headache, rash, bone pain, overall body pain, fatigue, Pavlovian responses to odors, memory loss, upper respiratory infections, Reactive Airways Dysfunction Syndrome, brain dysfunction, alterations in consciousness, and other ailments. (Pet. App. at 24-51.) The tenth plaintiff-petitioner asserted a loss consortium claim. (Pet. App. at 69-70.)

aggravation." [2] This testimony was allowed, and was considered by the jury, although as the court of appeals ultimately found, it had no scientific basis:

- Plaintiffs' experts "conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic." (Pet. App. at 13.) Plaintiffs' experts further "admitted that medical science has not determined the effects of short-term exposure to the solvents involved." (Pet. App. at 14.)

- Plaintiffs' experts admitted that "it would be improper to draw conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents." (Pet. App. at 13.) Certainly, these experts "did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed the testimony indicated small differences in molecular structure often have significant consequences." (Pet. App. at 12.)

- Plaintiffs' experts acknowledged—inapposite to the facts of the case—"that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship." (Pet. App. at 13.)

- Plaintiffs' experts found no relevant or reliable data on TCA or Perc on which to rely. (Pet. App. at 13-15.) To the extent the experts referred to any scientific data at all, "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable." (Pet. App. at 13.)

- One of the plaintiffs' experts testified only to "possibilities" rather than "probabilities." (Pet. App. at 14; *see also* Pet. App. at 24-51 (district court opin-

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[2] Hopkins suggests that he offered "[u]nchallenged trial testimony" with respect to his "severe" injuries. (Hopkins Pet. at 5.) The assertion is acutely wrong but is irrelevant to the writ.

ion).) In the alternative, after she "admitted she could not testify to a specific cause and effect relationship," she "relied instead on a 'whole person aggravation' theory without establishing that the theory had a scientific basis." (Pet. App. at 14.)

At the end of the trial, and largely because of what the district court described as "plaintiffs' choice of tactics" in unfairly and improperly presenting their causation case (Pet. App. at 52), verdicts were returned in favor of all plaintiffs. Thus, when General Electric timely filed post-trial motions, including a second renewed motion for judgment as a matter of law and a motion for a new trial, both supported with extensive memoranda, the district court granted General Electric substantial relief: the court concluded (1) that five plaintiffs had failed to present any expert evidence which was scientifically sound or causally sufficient and therefore entered judgment as a matter of law in favor of General Electric on those plaintiffs' claims; and (2) that four plaintiffs presented claims which were inexorably contaminated with unscientific and/or insupportable expert opinion and therefore granted General Electric a new trial on those plaintiffs' claims.[3] (Pet. App. at 24-52, 60.) Only Williams' verdict was not disturbed. (Pet. App. 43, 53, 60.) In its order, the district court also rejected the argument of Schudel and Hopkins that General Electric had improperly served its post-trial motions upon them because General Electric had mailed the motions by Federal Express rather than by postal delivery. (Pet. App. at 19-21.)

On cross-motions of the parties, the trial court certified as final the judgments entered on the claims of the six

[3] Carlson incorrectly asserts that the district court ruled pursuant to Federal Rule of Civil Procedure 59(d) (motion on court's initiative). (Carlson Pet. at 8, 22-24.) The record is to the contrary, as the court of appeals held: "The district court ordered a new trial under Rule 50(b)." (Pet. App. at 7 n.9.) *See also* Schudel Pet. at 4 ("trial court did not act under its Rule 59(d) authority").

plaintiffs whose cases were fully disposed of, *i.e.*, the five plaintiffs against whom judgment was entered and the one plaintiff in whose favor judgment was entered. (Pet. App. at 71-74.) The court declined to enter final judgment on any claim with respect to the four "new trial" plaintiffs. (Pet. App. at 73.)

B. Court of Appeals Proceedings

On January 24, 1995, General Electric timely noticed its appeal from the judgment entered in favor of Williams. All plaintiffs other than Williams cross-appealed by notice dated February 7, 1995.

In addressing General Electric's substantive appeal with respect to Williams, the court of appeals properly focused on *Daubert*: "Scientific knowledge is reliable if it is 'ground[ed] in the methods and procedures of science' and 'connotes more than subjective belief or unsupported speculation.' " (Pet. App. at 10-11 (quoting *Daubert*, 509 U.S. at 590).) "In determining reliability, '[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate.' " (Pet. App. at 11 (quoting *Daubert*, 509 U.S. at 595).)

The court of appeals then correctly determined that the district court had erred in allowing the testimony of Williams' experts, who had made "no showing" that their methods were scientifically sound. (Pet. App. at 13.) Thus, the principles and methodology underlying Williams' experts' opinions "did not meet *Daubert's* requirement of reliability." (Pet. App. at 12, 12-15.)[4] The court of appeals also properly concluded that "[a]dmission of the challenged evidence was prejudicial . . . because it was the sole causation evidence with respect to Williams' neurological symptoms." (Pet. App. at 14.) The court of appeals therefore vacated the judgment entered on the

[4] The court of appeals found that one of Williams' experts in fact failed to meet *both* the reliability *and* the relevance prongs of *Daubert*. (Pet. App. at 14.)

jury verdict in Williams' favor and remanded for a new trial which will address the other (non-neurological) injuries Williams claimed. (Pet. App. at 15.)

In addressing Schudel's substantive appeal (with respect to those plaintiffs against whom judgment had been entered on General Electric's post-trial motions), the court of appeals found that the district court "properly concluded that [Schudel's expert's] testimony based on the 'whole person aggravation' theory of causation did not meet the standard of *Daubert* . . . and should have been excluded." (Pet. App. at 9.) The court of appeals found prejudicial error, however, in the *timing* of such exclusion. Because the jury had rendered its verdict based on the improperly admitted evidence, the court of appeals found that the district court no longer had discretion to grant judgment as a matter of law in favor of General Electric and was instead restricted to ordering a new trial. (Pet. App. at 8-10.) The court of appeals therefore reversed the grant of judgment as matter of law in favor of General Electric and remanded. (Pet. App. at 10, 15.)

The Ninth Circuit dismissed the appeals of those plaintiffs who were subject to the district court's new trial order and whose only reviewable issue was a procedural objection to service by Federal Express. (Pet. App. at 4-7, 15.)[5] Although disagreeing with the district court's finding that Federal Express service was the equivalent of service by mail, the court of appeals found the issue moot in light of amendments to the Federal Rules of Civil Procedure which made clear that the timely filing of post-trial motions rather than the method or date of service preserved a party's right to post-trial review. (Pet. App. at 4-5.) The court of appeals did not conclude that

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[5] The court of appeals' procedural ruling applied to nine of the plaintiffs. Six of those plaintiffs also were parties to the merits-appeals which the court of appeals went on to consider. *See infra*, text at 6-7.

service was in fact untimely or address any of General Electric's alternative arguments on service, and it did not need to do so.

The court of appeals also dismissed the appeal of plaintiff Carlson, who was subject to the new trial order and presented no reviewable issue. (Pet. App. at 5-7, 15.)[6]

In light of the remands, all parties are now before the district court. The district court will conduct new trials with respect to those plaintiffs who had both sufficient (*i.e.* more-probable-than-not) and admissible evidence of injury consistent with the rulings of the court of appeals and with those rulings of the district court which were not disturbed on appeal.

SUMMARY OF ARGUMENT

Petitioners bring two primary arguments to the Court. Neither warrants the Court's exercise of its extraordinary and discretionary *certiorari* jurisdiction.

First, petitioners take issue with the application of *Daubert* in this case. Contrary to their assertions, *Daubert* does apply to diversity cases, and the court of appeals

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[6] Carlson and Hopkins argue that it was a "departure from usual and accepted judicial procedure, justifying this Court's exercise of its supervisory powers," for the court of appeals to decline to rule on the merits of their appeals. (Hopkins Pet. at 25-29; *see* Carlson Pet. at 24-25.) Carlson and Hopkins also each advance here their positions on the merits of those issues they claim the court of appeals should have reached, but did not. (For example, Carlson argues that the district court "*sua sponte* resurrected subissues that both parties and the court had earlier waived under [Federal Rule of Civil Procedure] 49(a)." (Carlson Pet. at 22.) Similarly, Hopkins argues that General Electric "failed to preserve any issue relative to the jury instructions." (Hopkins Pet. at 28-29.)) It is settled law that the courts of appeal have general jurisdiction only over final judgments and that orders granting new trials are interlocutory and not immediately appealable. *E.g.*, 28 U.S.C. § 1291 (1998); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). General Electric does not otherwise address these arguments in its opposition.

(like all of its sister circuits) required of petitioners exactly what *Daubert* itself requires—that they make some logical showing that their experts' opinions were grounded in good science. The court of appeals correctly reviewed the district court's rulings and correctly concluded that petitioners had made "no showing" of reliability. Petitioners' disagreement with the court of appeals' conclusion does not rise to the level of a *certiorari* concern.

Second, petitioners object to the court of appeals' discretionary determination that it would apply the amendments to the Federal Rules of Civil Procedure to this case, which was pending at the time of the amendments. Petitioners' arguments ignore this Court's instructions to the federal courts in this regard: the amendments "shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995). Petitioners' arguments also ignore the entirely uniform application of this Court's Order in dozens of decisions of the federal courts of appeals, including the decision below. No new or important issue was decided by the court of appeals, and no *certiorari* considerations are implicated by the court of appeals' decision.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW RAISED NO NEW ISSUE, MUCH LESS A COMPELLING ISSUE, WITH RESPECT TO *DAUBERT* AND PROPERLY HELD THAT *DAUBERT* APPLIED TO A DIVERSITY CASE PENDING IN FEDERAL COURT.

Petitioners Williams and Carlson contend that the district court, or the court of appeals, or both, erred in applying *Daubert* under the facts of this case. The decisions below did not raise any new issue, much less a

compelling issue justifying the exercise of this Court's *certiorari* jurisdiction, with respect to *Daubert*.

1. Carlson argues that the *Erie* Doctrine dictates that evidence need not be admissible under *Daubert* so long as the evidence is of the type which may be "sufficient" to sustain a judgment under state substantive law. (Carlson Pet. at 13-15 (citing *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).) His position is wrong. The Federal Rules of Evidence, including Rule 702 and hence *Daubert*, as a general matter govern the admissibility of all evidence in all cases—including diversity cases—in federal courts. If a Federal Rule of Evidence covers a point in dispute, Congress has mandated that such Rule be followed. *See* Fed. R. Evid. 101. Thus, in *Daubert*, itself a diversity case from California, this Court stated that because it was basing its decision "on the content of the congressionally-enacted Federal Rules of Evidence," it did not need to address the *Erie* Doctrine. 509 U.S. at 589 n.6.[7] *See also, e.g., Stutzman v. CRST, Inc.*, 997 F.2d 291, 295 (CA7 1993) ("We hold that the Federal Rules of Evidence govern the admissibility of expert testimony in federal diversity cases."); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054 (CA4 1986) (same); *Dawsey v. Olin Corp.*, 782 F.2d 1254 (CA5 1986) (same).

Moreover, Carlson misstates the facts when he asserts that the federal courts cannot apply *Daubert* in a manner consistent with Washington state law. (Carlson Pet. at 9-17.) The *Schudel* court specifically referred to the Washington state sufficiency standard in addressing the relevance prong of *Daubert*. (Pet. App. at 11.) The *Schudel* court properly held:

> A court's determination of relevance must consider the applicable substantive standard. Under Wash-

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[7] When *Daubert* was issued, California state courts applied (and even now still apply) the entirely different admissibility standards of *Kelly/Frye*. *E.g., People v. Leahy*, 8 Cal. 4th 587, 597-604, 882 P.2d 321, 323 (1994) (citing *Frye v. United States*, 293 F. 1013 (CADC 1923)).

> ington tort law, a plaintiff must show that "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wash. 2d 814, [824], 440 P.2d 823, 830 (1968). . . . Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries. . . .

(Pet. App. at 11 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320-22 (CA9 1995) (*Daubert II*) (emphasis in original).) The district court had properly identified the same standard. (Pet. App. at 46 (quoting *O'Donoghue*, 73 Wash. 2d at 824, 440 P.2d at 830) (a "might have" or "possibly did" opinion is "nothing more than conjecture").)

2. If *Daubert* applies, which of course it does, Carlson and Williams alternatively seek clarification as to whether *Daubert* should be read to accept more expert witness opinions, or fewer. (Carlson Pet. at 10-13; Williams Pet. at 18-19.) This results-oriented equation mocks the purpose of the *Daubert* inquiry. *Daubert* and its progeny direct the court's focus to the quality, not the quantity, of expert opinion that is admissible under Federal Rule of Evidence 702. The burden on the trial court is to conduct a highly fact-bound, flexible inquiry as to the reliability and relevance of the testimony. *Daubert*, 509 U.S. at 592-95; *General Electric v. Joiner*, 118 S. Ct. 512, 139 L. Ed. 2d 508, 517-18 (1997). This exercise assuredly sometimes results in the admission of opinion evidence and sometimes results in the exclusion of such evidence. That different facts compel different results suggests only that the federal courts are heeding the directive of this Court to act as a case-specific "gatekeeper" in evaluating each time whether scientific opinion evidence "is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 139 L. Ed. 2d at 519.

3. Williams argues that in this particular case the court of appeals went too far in assuring scientific reliability, but she mischaracterizes the court of appeals' reasoning in rejecting the testimony of her experts. In particular, it is simply wrong to claim, as Williams does, that there was "insistence by the Ninth Circuit opinion below that there be peer-reviewed (specific to the chemical and dosage) literature." (Williams Pet. at 27; *see also* Williams Pet. at 26 (accusing court of appeals of adopting "concept that peer-reviewed studies of the specific organic solvents used at the precise dosages are the only relevant method of evaluating scientific reliability").) Rather, the court of appeals found a complete lack of evidence that the testimony was grounded in good science: "Extrapolation was necessary to make the studies relevant, and *there was no showing that the necessary extrapolation was scientifically acceptable.*" (Pet. App. at 13 (emphasis added).) Such analysis was neither unusual nor improper; to the contrary, it reflected exactly the nature of the inquiry undertaken in every circuit that has had the opportunity to apply *Daubert* in the context of novel medical causation opinion testimony. *E.g.*, *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107-08 (CA8 1996) (analytical gap in opinion failed *Daubert* standards because it improperly left jury to speculate about whether exposure was sufficient to cause injury); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (CA7 1996) ("[w]e are baffled" by expert's failure to make "elementary distinction[s]" regarding exposure and dose); *Daubert II*, 43 F.3d at 1315-1316, 1319 (bald assurances of reliability fail *Daubert* test); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614 (CA7 1993) ("[i]f experts cannot tie their assessments of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury," and so such testimony is inadmissible under *Daubert*).

4. Williams complains that the court of appeals' opinion "fails to identify what standard of appellate review is

being undertaken," and she concurrently insists that the court must have applied an improper one. (Williams Pet. at 20.) Her argument is not supported by the record.

a. First, the standard of review was not disputed by any party to the appeal. Both Williams and General Electric requested abuse of discretion review on evidentiary matters, an unsurprising request given that the Ninth Circuit had expressly adopted and consistently applied this standard—not only on the admission of expert testimony in general but also on *Daubert* issues in particular —well before the opinion issued here. *See Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 596 (CA9 1996) (abuse of discretion standard applies to decision to admit expert testimony under Fed. R. Evid. 702 and *Daubert*); *Daubert II*, 43 F.3d at 1315 (same); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123 (CA9 1994) (same); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500 (CA9 1994) (same, phrased as "manifestly erroneous"); *United States v. Rincon*, 28 F.3d 921, 923 (CA9 1994) (same); *see also, e.g., United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (CA9 1993) (abuse of discretion review applies to rulings on admissibility of expert testimony) (pre-*Daubert*); *United States v. Rahm*, 993 F.2d 1405, 1409-10 (CA9 1993) (same) (citing cases). There is simply no reason to believe that the court of appeals unilaterally and *sub silentio* selected a different standard uniquely for this case.

b. Second, in the first part of its opinion addressing General Electric's appeal, the Ninth Circuit explicitly upheld the district court as properly having "acted within its discretion" in allowing Williams' experts to base their opinions on certain data. (Pet. App. at 12.) Williams fails even to acknowledge this point and cannot reconcile it with her assertions. It is absurd to suppose (and to seek *certiorari* on the supposition) that the court of appeals employed a different standard depending on which aspect of the experts' opinions was under review.

c. Certainly there is no confusion within the Ninth Circuit as to the standard of review that the *Schudel* court applied. In its most recent writing on the subject, the Ninth Circuit has summarized the *Schudel* holding thus: "district court *abused its discretion* in admitting expert testimony when witness 'could not testify to a specific cause and effect relationship . . . between exposure and health problems.' " *Cabrerra v. Cordis Corp.*, 134 F.3d 1418, ——, 1998 U.S. App. LEXIS 1245, *13 (CA9 1998) (citing *Schudel*, 120 F.3d at 997) (ellipsis in original; emphasis added).

d. Finally, Williams' accusations about what the court of appeals "ignored" are grossly speculative. The record on appeal was extensive and included trial testimony, voir dire, affidavits and offers of proof prepared by counsel —all appropriate to the question of whether the district court had abused its discretion. (Williams nevertheless proposes, without basis, that the court of appeals relied "upon the trial testimony of the experts alone, without consideration of the underpinnings set forth in the totality of the Offers of Proof. . . ." Williams Pet. at 23.) But "scientific knowledge" under *Daubert* is not judged by the volume of submissions. The reality is, despite the extensive record on appeal, the court of appeals correctly concluded "there was *no showing*" of scientific reliability. (Pet. App. at 13 (emphasis added).) Such a finding explicitly supports the conclusion that the district court abused its discretion in permitting the opinion testimony. *See, e.g., Wright*, 91 F.3d at 1107-08 (in circumstances closely similar to those in *Schudel*, reversing judgment entered on jury verdict; expert's opinion was "simply speculation" and was therefore inadmissible under *Daubert*) ("a plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover"); *Daubert II*, 43 F.3d at 1319 ("experts' un-

adorned assertions" with no showing of scientific reliability are *per se* inadmissible); *see also, e.g., Rosen,* 78 F.3d at 319 (noting lack of "any experimental, statistical, or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on theory"); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank,* 877 F.2d 1333, 1339 (CA7 1989) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process") (pre-*Daubert*).

5. In sum, Carlson's and Williams' *Daubert*-based arguments do not warrant the Court's exercise of its extraordinary and discretionary jurisdiction. The unanimous decision of the court of appeals does not conflict with any decision of this Court or any decision of any other court of appeals. Nor do the petitions present an important issue of law which needs to be addressed by this Court. Carlson and Williams simply seek reconsideration of the standards for the admissibility of expert testimony set forth five years ago in *Daubert* and affirmed this Term in *Joiner*.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE READILY AND UNIFORMLY ACTED WITHIN THEIR DISCRETION IN APPLYING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE TO A THEN-PENDING CASE IN ACCORDANCE WITH THE EXPRESS INSTRUCTIONS OF THIS COURT.

When General Electric timely filed its post-trial motions, it served copies on certain counsel by hand-delivery and other counsel by Federal Express. Schudel, Williams and Hopkins (collectively, "Schudel" for purposes of this discussion) argue that the motions were technically invalid because they were entitled to receive their service copies by postal delivery rather than by Federal Express delivery. The court of appeals correctly found that Schudel's argu-

ment was moot: amended Federal Rules of Civil Procedure 50 and 59 make clear that the validity of post-trial motions is judged by the date of filing rather than the date or type of service. *See, e.g.*, Fed. R. Civ. P. 50(b) (renew motion for judgment as a matter of law by "filing" within "10 days after entry of judgment"); Fed. R. Civ. P. 59 (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). The ruling was unremarkable and invoked no new or compelling issues of law.

1. This Court has ordered that the 1995 amendments to the Federal Rules of Civil Procedure "shall govern all proceedings in civil cases thereafter commenced and, *insofar as just and practicable, all proceedings in civil cases then pending*." Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995) (emphasis added). The court of appeals determined that it was just and practicable and so applied the Federal Rules as amended to this case, which was pending at the time of the amendments.

2. As would be expected given to the express language of the Court's order amending the Rules, there is no conflict among the circuit courts as to whether the amendments may apply to matters pending at the time of the amendments. Instead, "courts interpreting these effective dates provisos consistently have held that when it is 'just and practicable,' new Federal Rules may apply to a particular pending case." *United States v. Roberts*, 88 F.3d 872, 878 (CA10 1996) (citations omitted). In consequence, courts in every circuit have exercised proper discretion and applied the amended rules (or not) after considering whether it was factually appropriate, *i.e.*, "just and practicable," in a broad array of cases: [8]

[8] This Court has issued similar Orders in various amendments to the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *E.g.*, Order of April

District of Columbia Circuit: *Barbour v. Merrill*, 48 F.3d 1270 (CADC 1995) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Bayer v. United States Dep't of Treasury*, 956 F.2d 330, 334-35 (CADC 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending on appeal at time of amendment because "unquestionably" just and practicable).

First Circuit: *Silva v. Witschen*, 19 F.3d 725, 727-28 (CA1 1994) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because infeasible and would work injustice); *Freund v. Fleetwood Enters., Inc.*, 956 F.2d 354, 363 (CA1 1992) (declining to apply amended Fed. R. Civ. P. 15 under facts of case because would be "manifest injustice").

Second Circuit: *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468 (CA2 1995) (in *dicta*, noting option to remand to district court for "determination of whether applying the [1991] amended version [of Fed. R. Civ. P. 15(c)] would be 'just and practicable' "), *modified on other grounds*, 74 F.3d 1366 (CA2 1996).

Third Circuit: *MCI Telecoms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1091 (CA3 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment because just and practicable); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298 (CA3 1995) (same).

22, 1993, *reprinted in* 146 F.R.D. 404 (1993); Order of April 30, 1991, *reprinted in* 134 F.R.D. 495 (1991). The illustrative cases in the text arose under these various Orders. By way of contrast, certain Rule amendments may be limited so as *not* to apply to pending cases. *See, e.g.*, Pub. L. No. 104-208, Div. A, Title I, § 101(a) (1996) (amendments to Fed. R. Evid. 413 applicable only to "proceedings commenced on or after the effective date of the amendments, including all trials commenced on or after the effective date"); *see generally* 28 U.S.C. § 2074(a) (1997) (granting Supreme Court the discretion to determine applicability of its federal rules amendments to pending cases).

Fourth Circuit: *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1273-74 (CA4 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because "[n]o injustice would be worked" and applying the amended rule "works to preserve appealability and allows us to reach the merits. . . .").

Fifth Circuit: *Long v. Simmons*, 77 F.3d 878, 879 (CA5 1996) (applying 1995 amendments to Fed. R. Civ. P. 59 to case pending on appeal at time of amendment because just and practicable); *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765-66 & n.8 (CA5 1996) (applying 1993 amendments to Fed. R. Civ. P. 54(d) to case pending at time of amendment because just and practicable); *Elliott v. Tilton*, 64 F.3d 213, 215-16 (CA5 1995) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ford v. Elsbury*, 32 F.3d 931, 933-34 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 3 to case pending on appeal at time of amendment because just and practicable); *Garcia v. Wash*, 20 F.3d 608, 609 (CA5 1994) (same) (application of amendments "prevent[s] the loss of appellate rights"); *Burt v. Ware*, 14 F.3d 256, 257-58 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("appellees will not be prejudiced by employment of the new rules; rather they will simply lose a potential 'windfall' of having the appeal dismissed"); *Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 544-46 (CA5 1992) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending on appeal at time of amendment because just and practicable).

Sixth Circuit: *Ridder v. City of Springfield*, 109 F.3d 288 (CA6 1997) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ridder v. City of Springfield*, 1997 U.S. App. LEXIS 5118 (CA6 Mar. 13, 1997)

(applying 1993 amendments to Fed. R. Civ. P. 26 to case pending at time of amendment because just and practicable); *Runfola & Assocs. v. Spectrum Reporting II, Inc.*, 88 F.3d 368 (CA6 1996) ("it was within the district court's discretion as to which version of Rule 11 applied"); *Spurlock v. Demby*, 48 F.3d 1219 (Table), 1995 U.S. App. LEXIS 4321 (CA6 1995) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because not just and practicable).

Seventh Circuit: *Delgado-Brunet v. Clark*, 93 F.3d 339, 344 (CA7 1996) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable); *In re Generes*, 69 F.3d 821 (CA7 1995) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Cunningham v. Waters Tan & Co.*, 65 F.3d 1351 (CA7 1995) (same); *Cleveland v. Porca Co.*, 38 F.3d 289 (CA7 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund*, 25 F.3d 509 (CA7 1994) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 885-86 (CA7 1993) ("we honor the Supreme Court's express directive, and we therefore hold that the district court should have determined whether it was 'just and practicable' to determine the parties' rights and obligations under the new version of [Fed. R. Civ. P.] 15(c)").

Eighth Circuit: *United States v. Duke*, 50 F.3d 571, 574-76 (CA8 1995) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable).

Ninth Circuit: *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (CA9 1995) (applying 1993 amendments to Fed.

R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("To allow the parties to proceed to the appeal is just. Further, practicality is no problem."); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 887-88 (CA9 1994) (same); *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1501-02 (CA9 1994) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending at time of amendment because just and practicable); *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (CA9 1994) (applying 1993 amendments to Fed. R. App. 4 to case pending on appeal at time of amendment because just and practicable).

Tenth Circuit: *United States v. Platero*, 72 F.3d 806, 811 (CA10 1995) (applying 1994 amendments to Fed. R. Evid. 412 to case on remand at time of amendment because just and practicable); *Dahn v. United States*, 77 F.3d 492 (Table), 1996 U.S. App. LEXIS 2801 (CA10 1996) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Espinoza v. United States*, 52 F.3d 838, 840-41 (CA10 1995) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Cole v. Ruidosa Mun. Sch.*, 43 F.3d 1373, 1385-86 (CA10 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1440-41 (CA10 1994) (same); *In re Search of Premises Known as 6455 South Yosemite, Engelwood, Colo.*, 897 F.2d 1549, 1553-54 & n.5 (CA10 1990) (applying 1989 amendments to Fed. R. Crim. P. 41(e) to case pending at time of amendment because just and practicable).

Eleventh Circuit: *Chudasama v. Mazda Corp.*, 123 F.3d 1353 (CA11 1997) (applying 1993 amendments to Fed. R. Civ. P. 33(a) to case pending at time of amendment because just and practicable); *Silvious v. Pharaon*,

54 F.3d 697 (CA11 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment) ("plain language of Supreme Court's Order indicates that court has discretion as to which version of Rule applies); *Narey v. Dean*, 32 F.3d 1521, 1524 (CA11 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending at time of amendment because just and practicable) ("it is not an injustice for a party to lose the 'windfall' of having an appeal dismissed" on procedural grounds); *Virgo v. Rivera Beach Assocs.*, 30 F.3d 1350, 1355 n.3 (CA11 1994) (same); *Hill v. United States Postal Serv.*, 961 F.2d 153, 156 (CA11 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable).

3. None of these cases adopts a presumption of applicability of a *per se* rule. Nor did the court of appeals do so in this case. Hopkins' accusation that the court of appeals here found the amendments "automatically retroactive," (Hopkins Pet. at 11), is flatly contradicted by the record. The court specifically considered whether, in this case, the amendments would be just—"no prejudice will result"—and practicable—"no additional action on the part of the court or the parties is required to proceed." (Pet. App. at 5.) As the circuits have explicitly and correctly concluded, "the determination of when it is 'just and practicable' to retroactively apply [a Federal Rule], as amended, is necessarily a case-by-case consideration." *Duke*, 50 F.3d at 575. These cases track the guidance of this Court: "Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of a particular case." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 & n.29 (1994).

4. The cases also track "the general purpose of the [federal] Rules," to wit, "to minimize technical obstacles to a determination of the controversy of its merits." *G.F. Co.*, 23 F.3d at 1502 (quoting *United States ex rel. Atkins*

v. Reiten, 313 F.2d 673, 675 (CA9 1963)). *See also, e.g., Conley v. Gibson*, 355 U.S. 41, 48 (1957) (Federal Rules support common law goal to "facilitate a proper decision on the merits). The law accepts as "just" that which favors substance over procedure. *E.g., Burt*, 14 F.3d at 257-58 (not injustice to "lose a potential 'windfall' of having the appeal dismissed"); *Narey*, 32 F.3d at 1524 (same).

5. In *Landgraf*, this Court referred to a party's "diminished reliance interests in manners of procedure" while explaining why it had determined that amendments to the Federal Rules may apply to pending cases where just and practicable. 511 U.S. at 275 & n.29. The Court confirmed: "Because rules of procedure regulate secondary rather than primary conduct, the fact a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." 511 U.S. at 275. This case of course fairly illustrates the point—no "primary" conduct is at play in addressing the mechanics of service of timely-filed motions.[9]

6. Accepting the possibility that the amendments may indeed be applied to pending cases, Schudel alternatively argues that the court of appeals improperly exercised its discretion in applying the amendments to this particular case. (Schudel Pet. at 15-18; Hopkins Pet. at 15-20.) Schudel's factual complaints—made for the first time here[10]—pose nothing worthy of review. But *certiorari*

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[9] Although Hopkins proposes that this Court has never addressed the question of whether the amended rules of civil procedure may apply to pending cases (Hopkins Pet. at 14), both the Court's enacting Order and *Landgraf* provide the answer. Thus, there has never been controversy on the point in the federal courts.

[10] Schudel failed to respond in the court below to General Electric's submission pursuant to Federal Rule of Appellate Procedure 28(j) advising the court of appeals of the amendments to the Federal Rules. Schudel likewise failed to respond to General Electric's Supplemental Brief and motion for leave to file same relating to the

considerations aside, and even accepting the factual record as presented in the petitions, General Electric observes that Schudel cites to no genuine infeasibility or injustice that followed application of the amended Rules, and there is none. Thus, in the only published case *factually* on all fours with this case, the Fifth Circuit concluded, as did the Ninth Circuit here, that it was just and practicable to apply the 1995 amended rules regarding filing of post-trial motions to a matter pending on appeal at the time of the amendments. *See Long*, 77 F.3d at 879.

7. Schudel proposes that the case was not really "pending." (Hopkins Pet. at 15-17; Schudel Pet. at 16-17.) This odd argument finds no support in this Court's enabling Order and defies the record. The district court and then the court of appeals accepted jurisdiction over the case. No party contests that fact. Consequently, the court of appeals had the discretion to apply the amended rules to the case before it. *E.g.*, *Barber*, 34 F.3d at 1273-74 (applying amendments to case pending on appeal); *Long*, 77 F.3d at 879 (same); *Burt*, 14 F.3d at 257-60 (same); *Skoczylas*, 961 F.2d at 544-46 (same); *Ford*, 32 F.3d at 933-34 (same); *Garcia*, 20 F.3d at 6009 (same); *Cleveland*, 38 F.3d at 289 (same); *Duke*, 50 F.3d at 574-76 (same); *Schroeder*, 41 F.3d at 1276-77 (same); *Wallis*, 26 F.3d at 882 (same); *Leader Nat'l Ins. Co.*, 19 F.3d at 445 (same); *Cole*, 43 F.3d at 1385-86 (same); *Hill*, 961 F.2d at 156 (same); *Narey*, 32 F.3d at 1524 (same); *Virgo*, 30 F.3d at 1355 (same); *Barbour*, 48 F.3d at 1270 (same); *cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990) (appellate court may apply amendments to the law in the first instance "if, 'by its terms,' the law was to be applied to pending cases").

8. Schudel next proposes a collage of possible explanations for why the application of the amendments here was

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amendments. Nor did Schudel seek leave to file anything even after the court of appeals addressed the amendments at oral argument.

not "just or practicable." (Hopkins Pet. at 17-25; Schudel Pet. at 15-18.) Schudel misconceives the import of cases such as *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), *Chenault v. United States Postal Serv.*, 37 F.3d 535 (CA9 1994), and *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (CA10 1994), none of which involved the Federal Rules. Those cases re-stated the time-honored principle that a new law which impairs vested rights should not be given retroactive effect absent a clear indication in the law to the contrary. In this case, the enabling Order *expressly* allows application of the amended Rules to pending cases. Further, Schudel had no substantive vested right, impaired or otherwise. More precisely, "[n]o one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U.S. 55, 71 (1949) (quoting *Crane v. Hahlo*, 528 U.S. 142 (1922)).[11]

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[11] Schudel's arguments about the need for "finality" and the importance of "vested rights," (Hopkins Pet. at 20-25; Schudel Pet. at 16-17), in any event spurn the record and fail to address the considerations given by the courts below. The district court accepted General Electric's timely-filed post-trial papers and ruled, correctly, that Schudel had secured a verdict only by relying on a slate of improper and grossly tainted evidence. The court of appeals went even further, finding that a majority of the limited evidence the district court had ultimately found admissible was itself improper and unreliable. Schudel would have his improperly-secured verdicts reinstated by insisting on application of a now-defunct procedural rule. Schudel's equities-based arguments on what is "just and practicable" cannot stand the slightest scrutiny.

Moreover, Schudel's equity argument is baffling even under the old version of Rule 50. He would have General Electric forfeit its right to appeal because, when General Electric timely-filed its post-trial motions, it extended the courtesy of service by overnight mail rather than postal delivery. Schudel's protests aside, there is no innate or constitutional right to service by postal delivery. Indeed, service rules are frequently revised. *See, e.g.*, Fed. Rs. App. P. 25, 26 (1996) (referencing service by commercial carrier); Fed. R. Civ. P. 4 (1995) (same); *see generally* 28 U.S.C. § 2071 (1997) (authorizing district court rulemaking); Fed. R. Civ. P. 83 (same).

9. Finally, General Electric observes that even if the Court saw fit to grant *certiorari* and ultimately determined that the amendments to federal rules may not be applied to pending cases, the ruling would be of doubtful consequence to this case. As General Electric argued in the proceedings below, its post-trial filings, made on the tenth day after entry of judgment and served that day by Federal Express, were proper for several reasons even under the old Federal Rule of Civil Procedure 50 (requiring filing and service within 10 days of judgment): First, Federal Express is indeed the legal and practical equivalent of mail.[12] Second, all parties had consented to service by Federal Express by engaging in service by Federal Express or other alternatives to postal delivery throughout the extensive litigation.[13] Third, lead trial counsel had assumed representation of all plaintiffs, and she had been served by hand-delivery.[14] Any one of those considera-

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[12] *See generally* 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982); 39 C.F.R. Parts 310, 320 (1995); 44 Fed. Reg. 61,181 (Oct. 24, 1979) (suspending Private Express restrictions for carriage of express mail or overnight service). Further, as the district court noted and the comments to the newly-amended Federal Rules of Appellate Procedure observe, parties reasonably may expect private express mail delivery to be more prompt and more reliable than postal delivery. *See* Pet. App. at 21; Fed. Rs. App. P. 25, 26 (comments). Those expectations of course were realized here; Schudel's service copies were delivered overnight.

[13] *See, e.g., Magnusen v. Video Yesteryear*, 85 F.3d 1424, 1431 (CA9 1996) (parties' course of conduct may validate mode of service); *Salley v. Board of Governors, University of North Carolina, Chapel Hill, N.C.*, 136 F.R.D. 417 (MDNC 1991) (same).

[14] General Electric noted that lead trial counsel had signed pleadings on behalf of all plaintiffs, had presented many of the plaintiffs on direct testimony at trial, and had otherwise acted as common counsel. *See, e.g.*, Wash. (E.D.) L.R. 1.2(d)(1) ("filing of any pleading shall constitute an appearance by the attorney who signs the pleading"). Although General Electric always extended courtesy service to all counsel, under the Rules General Electric was required to serve only lead trial counsel, which it did. *See, e.g., Buchanan v. Sherrill*, 51 F.3d 227, 228 (CA10 1995) (rules do not require

tions is enough to defeat Schudel's no-service-by-Federal-Express-overnight-mail complaint, quite apart from any question of the proper application of the 1995 amendments in this case.

The court of appeals did not reach General Electric's alternative arguments, or remand to the district court for further findings, or decide the question of whether service had been effected. It did not need to do so; the amendments to the Federal Rules mooted the inquiry. Thus, although the court of appeals—citing its then-new opinion in *Magnusen v. Video Yesteryear*, 85 F.3d 1424 (CA9 1996)—noted in *dicta* its opinion that delivery by Federal Express did not satisfy mail delivery requirements in the Ninth Circuit, it never "concluded that the attempt to serve Hopkins . . . was ineffective and therefore untimely," (Hopkins Pet. at 2 n.1, 9), or that General Electric's post-trial motions were "untimely," (Schudel Pet. at 10). Indeed, to make such a determination even under *Magnusen*, the courts below would have had to determine, *inter alia*, whether the parties' course of conduct permitted service by Federal Express. 85 F.3d at 1431. No such inquiry was undertaken or needed in light of the Rule amendments.

10. As is the case with their *Daubert*-based arguments, petitioners' arguments on application of the Federal Rules pose nothing new or worthy of this Court's extraordinary *certiorari* jurisdiction. The court of appeals applied the usual principles of interpretation, and its unanimous decision does not conflict with any decision of this Court or any other court. *See Roberts*, 88 F.3d at 878 (noting "consistent" interpretation of the effective date provisos of the amendments). Further, when it issued its decision, the court of appeals was acting on the discretion expressly granted to it by this Court.

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service on each of several counsel appearing on behalf of a party); *Daniel Int'l Corp. v. Fishbach & Moore, Inc.*, 916 F.2d 1061, 1063 (CA5 1990) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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